Talsol Corporation *and* United Steelworkers of America, AFL–CIO–CLC *and* Darryl Denham. Cases 9–CA–28466–1, 9–CA–28517–1, –2, –3, –4, 9–CA–28624, 9–CA–28665, 9–CA–28725, 9–CA–28887, 9–CA–28974, 9–CA–29114, 9–CA–29183, 9–CA–29351, 9–CA–29459, and 9–CA–29895–2

May 8, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On December 30, 1993, Administrative Law Judge George F. McInerny issued the attached decision. The Respondent and the General Counsel each filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified and set forth in full below.[2]

1. The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to follow its past practice of granting wage increases to certain employees. The Respondent had a policy of evaluating employees in the spring of each year and subsequently granting raises to certain unit employees later in June. On May 31, 1991, after a May 10 representation election but before the Union's certification as representative, the Respondent advised the Union that it did not want to give the June increases because of its ''legal obligation to maintain the status quo pending negotiations.'' In its June 5 response, the Union urged the Respondent to continue its past practice of granting the June increases. The Respondent then proposed in a June 7 letter that the June increases be postponed ''pending negotiations for a contract.'' The Union did not respond.

In addition, on June 24 the Respondent advised the Union that it planned to increase the wages of certain paintmakers. By June 27 letter the Union rejected the Respondent's proposed increase and advised the Respondent that it was willing to negotiate the wages for all employees.

The judge found that the June wage review program was a term and condition of employment and that the Respondent's unilateral change in that term and condition of employment was a violation of Section 8(a)(5) and (1). The Respondent had a preexisting practice of reviewing employee performance in the spring of the year and awarding raises to worthy employees in June. By letter dated May 31, 1991, the Respondent informed the Union that it would not be awarding the raises in June 1991. In our view, this belated letter did not give the Union reasonable notice and opportunity to bargain, and, a fortiori, was prior to impasse. Accordingly, a violation exists under either of the views expressed in *Daily News of Los Angeles*, 315 NLRB 1236 (1994).

Accordingly, we find that the Respondent's discontinuance of its customary wage increases in June 1991 violated Section 8(a)(5) and (1) of the Act.

2. The General Counsel has excepted to the judge's finding that there was no complaint allegation that employee Pam McNew had been unlawfully transferred to the aerosol line and his statement that he would make no finding on the transfer.[3] We agree with the General Counsel. On May 27, 1992, at the hearing, the judge allowed the General Counsel to orally amend paragraph 7(e) of the sixth consolidated amended complaint to allege McNew's unlawful transfer. In his decision, the judge made findings of fact consistent with the legal conclusion that McNew's transfer violated Section 8(a)(3) and (1). In that regard he found that McNew was transferred a few days after the Respondent received the Union's April 15, 1991 letter identifying McNew as an in-plant organizer. The judge further found that other union activists were unlawfully transferred to the aerosol line and that the aerosol room ''lent itself to use as a kind of insulated holding pen to prevent the spread of unionism among its employees'' (sec. III,F,2, 11th paragraph) and that ''it follows, then, that the assignment to the aerosol line was a punishment for union activities, and a separation of known union activists.'' (Sec. III,F,2, 12th paragraph.) Thus, we find merit to the General Counsel's exception and we conclude that McNew was unlawfully transferred. We shall modify the conclusions of law, remedy, Order, and notice accordingly.

3. The judge found, inter alia, that the Respondent violated Section 8(a)(1) by imposing more onerous working conditions on employee Curtis Compton, issuing a warning and suspension to employee Geraldine Broadus, issuing a disciplinary warning to employee Sue Brewer, transferring Brewer and employee Velvie

[1] In agreeing with the majority that the Respondent violated Sec. 8(a)(1) by discharging employee Darryl Denham because of remarks concerning employee safety that he made at a safety meeting also attended by other employees, Chairman Gould does not rely on *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*); *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*).

[2] The General Counsel filed limited exceptions to the judge's decision requesting that the conclusions of law, remedy, Order, and notice conform to the findings made by the judge. We find that the exceptions have merit and will amend the conclusions of law and remedy accordingly and provide a new Order and notice.

[3] The judge, inadvertently or otherwise, did in fact list McNew with other employees whom he found had been unlawfully transferred (sec. III,F,3, last paragraph).

Wood to second shift, discharging Brewer and Wood, and restricting employees Tina Pendergrass and Teresa Kee to their work areas. The General Counsel has excepted to the judge's failure to find that, by all of these actions, the Respondent also violated Section 8(a)(3). Again, we find merit to the General Counsel's exceptions. In each instance the judge made specific findings that the above-noted actions were taken against the employees because of their union activities. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) and will modify the conclusions of law, remedy, Order, and notice accordingly.

AMENDED CONCLUSIONS OF LAW

1. Talsol Corporation is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. Since August 12, 1991, the Union has been the certified bargaining agent for a unit of the Respondent's employees, described as follows:

> All full-time and regular part-time production and maintenance employees employed at Talsol's Union Township, Ohio, facility, including all warehouse employees, shipping clerks, packers, shippers/pickers, paintmakers and color matchers, but excluding all office clerical employees, managerial employees, technical employees, laboratory employees, salesmen, temporary employees, and all professional employees, guards and supervisors as defined in the Act.

4. By physically and verbally threatening employees, threatening retaliation, threatening to reduce wages, threatening or predicting loss of benefits, plant closure, loss of jobs, more onerous working conditions, disciplinary actions, assignments to harder jobs, interrogating employees, imposing restrictions, rescinding privileges, denying union representation to employees during disciplinary interviews, creating the impression that employees' union activities were under surveillance, promulgating rules, and harassing employees, the Respondent has violated Section 8(a)(1) of the Act.

5. By issuing the April 8, 1991 warning/reprimand to Sue Brewer; the July 23 and 29 and September 9 and 11 warnings/reprimands to Betty Bates; the July 19 and August 13 and 30 warnings/reprimands to Tina Pendergrass; the September 9 warning/reprimand to Elaine Jones; the October 30 warning to Al Isaac; the April 14 suspension to Sue Brewer; the May 22 warning/suspension to Geraldine Broadus; the August 2 suspension to Betty Bates; the August 19 suspension to Pam McNew; the reduction of Curtis Compton's wages; the docking of Betty Bates' pay on November 1 and Al Isaac's on August 19; the April transfer of Pam McNew; the transfer to second shift of Sue Brewer and Velvie Wood; the transfers of Betty Bates on April 24, Tina Pendergrass, Treasure Chestnut, Teresa Kee, and Vicki Maxfield on April 29 and Al Isaac, Elaine Jones, and Debbie Middleton on September 4; and the discharges of Teresa Greene, Ernest Fultz, Curtis Compton, Darryl Denham, Sue Brewer, Velvie Wood, and Pam McNew, the Respondent has violated Section 8(a)(3) and (1) of the Act.

6. By the September 1991 layoffs of employees from the aerosol line, by subjecting employees including Tina Pendergrass and Teresa Kee to isolated and oppressive working conditions and undue restrictions, by changing employee working conditions and by imposing more onerous working conditions on employees including Curtis Compton, the Respondent has violated Section 8(a)(3) and (1) of the Act.

7. By requiring employees to take physical examinations and drug tests, by punishing an employee for allegedly failing a drug test, by failing to follow its past practice of annually evaluating employees and granting wage increases, by unilaterally implementing new job quotas, by unilaterally imposing a new system of layoffs and changing work hours, and by failing and refusing to give notice and bargain with the Union before implementing changes in terms and conditions of employment, the Respondent has violated Section 8(a)(5) and (1) of the Act.

AMENDED REMEDY

Having found that the Respondent has committed numerous unfair labor practices we shall order that it cease and desist, and that it take certain affirmative actions designed to effectuate the policies of the Act.

Having found that the Respondent has violated the law by unlawfully predicting loss of benefits, plant closure, and loss of jobs; threatening employees to reduce wages; threatening employees with reprisals, disciplinary action, and assignment to harder jobs; interrogating employees; imposing restrictions on employees; creating the impression of surveillance; imposing more onerous working conditions on employees including Curtis Compton; rescinding the privileges of Curtis Compton including depriving him of his parking space; physically threatening employees; denying union representation to employees during disciplinary interviews; and subjecting employees to oppressive working conditions and restrictions, we shall order that it cease and desist.

Having found that the Respondent has violated the law by issuing Employee Discipline Reports to Sue Brewer on April 8;[4] Betty Bates on July 23 and 29 and September 9 and 11; Tina Pendergrass on July 19 and August 13 and 30; Elaine Jones on September 9; and Al Isaac on October 30, we shall order that all such

[4] All dates are 1991 unless otherwise indicated.

reports be removed from the Respondent's files, and all records of such discipline be expunged.

Having found that the Respondent has violated the law by transferring Sue Brewer and Velvie Wood to second shift, transferring Pam McNew in April, transferring employees Betty Bates on April 24, Tina Pendergrass, Treasure Chestnut, Teresa Kee, and Vicki Maxfield on April 29, and Al Isaac, Elaine Jones, and Debbie Middleton on September 4 to other departments and other shifts, we shall order that it offer any employee so transferred immediate transfer back to the shifts or departments from which they were transferred.

Having found that the Respondent has violated the law by suspending employees Geraldine Broadus, Sue Brewer, Betty Bates, Tina Pendergrass, Pam McNew, Elaine Jones, Alan Isaac, and Mike Vanney, we shall order that the records of those suspensions be removed from the employees' files, and that the employees be made whole for any wages lost due to those suspensions.

Having found that the Respondent violated the Act by docking the pay of Betty Bates on November 1 and Al Isaac on August 19 and having found that the Respondent reduced the wages of Curtis Compton, we shall order that the employees be made whole for such losses.

Since we have determined that employees working on the Respondent's aerosol line on various dates in September 1991 were unlawfully laid off, we shall order that those employees working on those days, to be determined at the compliance stage of these proceedings, be made whole for the wages they lost on those days.

Having found that the Respondent has unlawfully discharged employees Teresa Greene, Ernest Fultz, Curtis Compton, Darryl Denham, Sue Brewer, Velvie Wood, and Pam McNew, we shall order that these employees be offered immediate and full reinstatement to their former positions or, if those positions are no longer available, to substantially equivalent positions, together with all seniority and other rights and privileges to which they would have been entitled, but for the discrimination against them, and that they be made whole for any wages and other benefits they may have lost by reason of the discrimination against them, less any interim earnings, with the amounts due and interest computed in accordance with the formulas in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987), respectively.

Having found that the Respondent has withheld wage increases to which bargaining unit employees were entitled and would have received but for the Respondent's unilateral conduct in violation of Section 8(a)(5) of the Act, we shall order that each of the affected employees in the bargaining unit be made whole for the increases they would have received since May 31, 1991, by payment to them of the difference between their actual wages and the wages they would have otherwise received, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest computed as described above.

Having found that the Respondent has unilaterally required employees to take physical examinations, including drug tests, we shall order that it rescind this requirement and also rescind all punishments administered to employees for alleged failure to pass a drug test, removing from those employees' files all references to such discipline. We shall also order the Respondent to make employees whole for any losses they may have suffered as a result, with interest computed as described above.

Having found that the Respondent has violated the law by unilaterally implementing new job quotas, a new system of layoffs, and changing work hours and by failing and refusing to give notice and bargain with the Union before implementing such changes, we shall order it to rescind these changes and bargain with the Union before implementing such changes in the future.

In this case the violations we have found are of such grievous and aggravated nature as to show a calculated disregard for the statutory rights of employees and have caused employees to be deprived of their rights since April 1991. In these circumstances, we conclude that a broad remedial order is warranted. *Hickmott Foods*, 242 NLRB 1357 (1979).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Talsol Corporation, Union Township, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Physically and verbally threatening employees, threatening retaliation, loss of employment, plant closing, wage reductions, loss of benefits, harder job assignments, discipline, and more onerous working conditions because of the employees' union sympathies or activities, or their protected, concerted activities.

(b) Giving the impression of surveillance of employees' union activities.

(c) Refusing employees union representation during disciplinary interviews.

(d) Imposing restrictions on employees, changing their working conditions, and subjecting employees to isolated and oppressive working conditions and undue restrictions.

(e) Rescinding privileges from employees including Curtis Compton because of their union activities.

(f) Transferring employees from one shift to another, or from one department to another, lowering their pay, or docking their pay, because of the employees' union activities.

(g) Suspending employees because of their union activities.

(h) Laying off employees because of their union activities.

(i) Discharging employees because of their union activities.

(j) Imposing requirements that employees observe certain subjective standards of conduct and punishing employees for violating those standards because of their union activities, or because of the union activities of other employees.

(k) Unilaterally discontinuing its past practice of annually evaluating employee performance and awarding wage increases and unilaterally instituting new safety rules, new work quotas, a new system of layoffs, and new work hours, and by instituting a new requirement for employees to take physical examinations and drug tests.

(l) Punishing employees who fail to meet these new quotas or who fail to pass drug tests.

(m) Failing and refusing to bargain with the certified union with regard to terms and conditions of employment for unit employees.

(n) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from the personnel files of individual employees all warnings found in this decision to have been unlawfully issued and expunge from all corporate records any reference to these warnings including the April 8 warning to Sue Brewer; the July 23 and 29 and September 9 and 11 warnings to Betty Bates; the July 19 and August 13 and 30 warnings/reprimands to Tina Pendergrass; the September 9 warning to Elaine Jones; and the October 30 warning and August 19 ''point'' to Al Isaac.

(b) Remove from the personnel files of individual employees including Sue Brewer, Geraldine Broadus, Betty Bates, and Pam McNew, records of layoffs or suspensions found in this decision to have been unlawfully imposed, expunge from all corporate records any references to such suspensions, and make these individuals whole for any wage and benefit losses they suffered by reason of the discrimination against them, with interest, as set out in the amended remedy, above.

(c) Transfer back, to the extent it has not already done so, the employees including Pam McNew, Betty Bates, Sue Brewer, Velvie Wood, Tina Pendergrass, Treasure Chestnut, Teresa Kee, Vicki Maxfield, Al Isaac, Elaine Jones, and Debbie Middleton, who were unlawfully transferred to the aerosol room during April through September 1991.

(d) Offer to Teresa Greene, Ernest Fultz, Curtis Compton, Darryl Denham, Sue Brewer, Velvie Wood, and Pamela McNew immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, as set forth in the amended remedy.

(e) Make whole employees Betty Bates, Al Isaac, and Curtis Compton for lost wages suffered by them by reason of the discrimination against them, with interest, as set forth in the amended remedy.

(f) Make whole each of the employees in the bargaining unit for the increases they would have received since May 31, 1991, by payment to them of the difference between their actual wages and the wages they would have otherwise received, with interest, as set forth in the amended remedy.

(g) Rescind the unilaterally imposed requirement for physical examinations and rescind all references to punishment meted out to employees for allegedly failing drug tests administered as a part of such physical examinations. If any employees suffered financial losses because of failing to pass these drug tests, the employees shall be made whole, with interest, as set forth in the amended remedy.

(h) Rescind all unilateral changes unlawfully imposed, including the change in work quotas, working hours, and safety rules, and rescind all references to punishment and revoke all disciplinary actions issued pursuant to any of the above-noted unilateral changes.

(i) Restore the working conditions and privileges available to employees prior to their discriminatory change and rescind the unlawful restriction of employee movements.

(j) Bargain, on request, with the certified collective-bargaining representative of the employees in the unit about wages, hours, and terms and conditions of employment, including work quotas, working hours, and safety rules.

(k) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payments records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(l) Post at its Union Township, Ohio facility copies of the attached notice marked ''Appendix.''[5] Copies of

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a

Continued

the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(m) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT physically and verbally threaten employees, threaten retaliation, loss of employment, plant closing, wage reductions, loss of benefits, harder job assignments, discipline, or more onerous working conditions because of their activities on behalf of United Steelworkers of America, AFL–CIO–CLC, or any other union, or activities they engage in for their mutual aid or protection.

WE WILL NOT give employees the impression that their union activities are under surveillance.

WE WILL NOT refuse employees union representation during disciplinary interviews.

WE WILL NOT impose restrictions on employees, change their working conditions, or subject them to oppressive and isolated working conditions because of their union activities or activities for their own mutual aid or protection.

WE WILL NOT rescind privileges from employees because of their union activities.

WE WILL NOT transfer employees from one shift or department to another, reduce or dock the wages of employees, suspend or lay off employees because of those employees' union activities or activities for their own mutual aid or protection.

WE WILL NOT discharge employees because of their union activities or activities for their own mutual aid or protection.

WE WILL NOT impose requirements that employees observe certain subjective standards of conduct or punish employees for violating those standards because of their union activities.

WE WILL NOT unilaterally discontinue our past practice of annually evaluating employees and giving wage increases and WE WILL NOT unilaterally institute new safety rules, new work quotas, a new system of layoffs, and new work hours.

WE WILL NOT unilaterally require employees to take physical exams and drug tests in order to keep their jobs.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL remove from the personnel files of individual employees all warnings found to have been unlawfully issued and expunge from all corporate records any reference to those warnings including the April 8 warning to Sue Brewer; the July 23 and 29 and September 9 and 11 warnings to Betty Bates; the July 19 and August 13 and 30 warnings/reprimands to Tina Pendergrass; the September 9 warning to Elaine Jones; and the October 30 warning and August 19 ''point'' to Al Isaac.

WE WILL remove from the personnel files of individual employees including Sue Brewer, Geraldine Broadus, Betty Bates, and Pam McNew, records of layoffs or suspensions found to have been unlawfully imposed, expunge from all corporate records any references to such suspensions, and make those individuals whole for any wage and benefit losses they suffered by reason of these actions against them, with interest.

WE WILL transfer back, to the extent we have not already done so, the employees including Pam McNew, Betty Bates, Sue Brewer, Velvie Wood, Tina Pendergrass, Treasure Chestnut, Teresa Kee, Vicki Maxfield, Al Isaac, Elaine Jones, and Debbie Middleton, who were found to have been unlawfully transferred to the aerosol room during April through September 1991.

WE WILL offer to Teresa Greene, Ernest Fultz, Curtis Compton, Darryl Denham, Sue Brewer, Velvie Wood, and Pamela McNew immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL

make them whole for any loss of earnings and other benefits suffered as a result of the actions against them, with interest.

WE WILL make whole employees Betty Bates, Al Isaac, and Curtis Compton for lost wages suffered by reason of the actions against them, with interest.

WE WILL make whole each of the employees in the bargaining unit for the increases they would have received since May 31, 1991, by payment to them of the difference between their actual wages and the wages they would have otherwise received, with interest.

WE WILL rescind the unilaterally imposed requirement for physical examinations and rescind all references to punishment meted out to employees for allegedly failing drug tests administered as a part of such physical examinations. If any employees suffered financial losses because of failing to pass such a drug test, their losses shall be reimbursed.

WE WILL rescind all unilateral changes in working conditions, including the change in work quotas, working hours, and safety rules and WE WILL rescind all references to punishment and revoke all disciplinary actions issued pursuant to any of the above-noted unilateral changes.

WE WILL restore the working conditions and privileges available to employees prior to the unilateral changes and rescind the restriction on employee movements.

WE WILL bargain, on request, with the certified collective-bargaining representative of the employees in the unit about wages, hours, and terms and conditions of employment, including work quotas, working hours, and safety rules. The unit is:

> All full-time and regular part-time production and maintenance employees employed at our Union Township, Ohio, facility, including all warehouse employees, shipping clerks, packers, shippers/-pickers, paintmakers and color matchers, but excluding all office clerical employees, managerial employees, technical employees, laboratory employees, salesmen, temporary employees, and professional employees, guards and supervisors as defined in the Act.

TALSOL CORPORATION

Engrid Emerson Vaughan, Esq. and *Deborah R. Grayson, Esq.*, for the General Counsel.

James A. Mills, Esq. (Denlinger, Rosenthal & Greenberg), of Cincinnati, Ohio, for the Respondent.

Peter M. Fox, Esq. (Kircher, Robinson, Cook, Newman & Welch), of Cincinnati, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE F. MCINERNY, Administrative Law Judge. This case is based on a number of charges filed against Talsol Corporation (Talsol, the Company, or Respondent) by the United Steelworkers of America, AFL–CIO–CLC (the Union) at various dates between April 17, 1991, and September 1, 1992.

After investigation of these charges,[1] the Regional Director for Region 9 of the National Labor Relations Board (the Regional Director and the Board) issued a series of complaints as follows:

1. Complaint in Case 9–CA–28466–1 on May 15, 1991
2. Amended consolidated complaint in Cases 9–CA–28466–1, 9–CA–28517–1–2–3–4, and 9–CA–28624 on June 28, 1991
3. Second amended consolidated complaint in Cases 9–CA–28466–1, 9–CA–28517–1–2–3–4, 9–CA–28624 and 9–CA–28665 on July 24, 1991
4. Third amended consolidated complaint in Cases 9–CA–28466–1, 9–CA–28517–1–2–3–4, 9–CA–28624, 9–CA–28665, and 9–CA–28725 on August 15, 1991
5. Fourth amended consolidated complaint in Cases 9–CA–28466–1, 9–CA–28517–1–2–3–4, 9–CA–28624, 9–CA–28665, 9–CA–28725 and 9–CA–28887 on October 31, 1991
6. Fifth amended consolidated complaint in Cases 9–CA–28466–1, 9–CA–28517–1–2–3–4, 9–CA–28624, 9–CA–28665, and 9–CA–28725, 9–CA–28887, and 9–CA–29114 on November 29, 1991
7. Sixth amended consolidated complaint in Cases 9–CA–28466–1, 9–CA–28517–1–2–3–4, 9–CA–28624, 9–CA–28665, and 9–CA–28725, 9–CA–28887, and 9–CA–29114, and 9–CA–28974 on January 8, 1992[2]
8. Complaint in Case 9–CA–29183 on February 14, 1992[3]
9. Amended consolidated complaint in Cases 9–CA–29183 and 9–CA–29351 on March 20, 1992
10. Order by administrative law judge, consolidating Cases 9–CA–29183 and 9–CA–29351 with Cases 9–CA–28466–1 et al.
11. Complaint in Case 9–CA–29459 on May 7, 1991
12. Order by administrative law judge consolidating Case 9–CA–29459, on the record of the reopened hearing, May 26, 1992, with Cases 9–CA–28466–1 et al.
13. Complaint in Case 9–CA–29895–2 on October 14, 1992
14. Order by administrative law judge consolidating Case 9–CA–29895–2 with Cases 9–CA–28466–1 et al.

[1] And others where the underlying charges were withdrawn or dismissed, and do not concern us here.

[2] This document is referred to throughout as ''the Complaint.'' Other complaints are identified by their dates of issuance.

[3] The hearing had opened on January 27, 1992.

The Respondent filed timely answers to all of these complaints, denying the commission of any unfair labor practices.

The hearing opened on January 27, 1992, and continued through January 31, recessed until May 26 and 27, then recessed again, resuming on December 7, 1992, and finally concluding on December 9. At the hearing all parties were represented by counsel, and had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, to make motions and raise objections, and to argue orally.

After the hearing was concluded, all parties filed briefs, which have been carefully considered.[4]

Based on all of the evidence here, including my observations of the witnesses, and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Talsol Corporation, an Ohio corporation, is a wholly owned subsidiary of RPM, Inc., of Medina, Ohio, an Ohio corporation. Talsol maintains a plant in Union Township, Butler County, Ohio[5] where it is engaged in the manufacture, packaging, and sale of paints and related chemical products mainly to automobile dealers, repair shops, auto parts distributors, wholesalers, and retailers throughout the United States and Canada. During the 12-month period ending November 1, 1991, Talsol sold and shipped from its Union Township (Cincinnati) location goods valued at over $50,000 directly to points outside the State of Ohio.

The complaints allege, the answers admit, and I find that Talsol is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

II. THE LABOR ORGANIZATION

The complaints allege, the answers admit, and I find that United Steelworkers of America, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The events which make up the allegations in the several complaints issued in this case arose out of an organizational campaign begun by the Union about March 12, 1991, and continuing through an election conducted by the Regional Director for Region 9 in Case 9–RC–15872, on May 10, 1991, which resulted in a majority for the Union of 20 votes to 16. The Union was certified as the collective-bargaining representative of a unit of Talsol's employees on August 12, 1991. The unit so certified is:

> All full-time and regular part-time production and maintenance employees employed at the Employer's Union Township, Ohio, facility, including all warehouse employees, shipping clerks, packers, shipper/pickers, paint makers and color matchers, but excluding all office clerical employees, laboratory employees, salesman, temporary employees, and all professional employees, guards, and supervisors as defined in the Act.

The Respondent admitted in its answers that this is an appropriate unit.

As part of the background to these cases, I note that there was evidence here of a prior campaign, by the Teamsters Union, in late 1988 and early 1989. Betty Bates, an employee who had been with Talsol from May 1982 down to the time of this hearing, testified that during this organizational campaign she served as an intelligence agent or, in her own words, a ''snitch'' for the Company. Bates testified that she approached her supervisor, Rich Memoli, about obtaining information about the union campaign for the Company, and that Memoli referred her to Dave Blizzard, the Company's vice president for research and development. She then talked to Blizzard and Company President Terry Merrill about her going to union meetings and checking them out. Bates went to all of the union meetings and then told Blizzard and Merrill what went on, who was there, who were union supporters, and what literature was distributed. She also participated in discussions with Blizzard in which he told her that he was going to put all the troublemakers in one building, so that company people would be protected against union supporters. Blizzard also mentioned that there had been sabotage going on and he felt that they (union people) were causing problems.

There is, of course, nothing wrong with obtaining information voluntarily proffered by an employee without fear of reprisals or promises of benefit.[6] Counting of votes in a preelection situation is a uniform practice for unions and management. It is a risky business, particularly for management, but can be valuable in formulating legitimate, as well as unlawful, election strategy.

Blizzard did not deny Bates' story, but put a little different twist on it, describing Bates as ''always trying to bring information to us about what she heard at meetings and who was union members and who was against it and all kinds of stuff like that.'' He did admit that this information was not forced on the Company, and that they did listen to it. Blizzard was not asked about his comments to Bates that the Company would quarantine union ''troublemakers'' in one building, nor about his fears of union-generated ''sabotage.'' Bates' version of these aspects of the incident stands undenied.

I have set out this incident because I believe it is instructive as to the attitude of Blizzard in particular, and the Company in general, when faced with another organizing campaign in 1991.

Another part of the background in this case is the investigation of the Company's safety and health conditions and practices by the Occupational Safety and Health Administration (OSHA), an agency of the United States Department of Labor. The OSHA investigation is integral not because that

[4] On February 18, 1993, the General Counsel moved to correct the transcript. There was no opposition to this motion, and as the proposed corrections comport with my recollections, the motion is allowed, and the corrections are incorporated into the record.

[5] Located just outside the city limits of the city of Cincinnati.

[6] There is no evidence that Betty Bates was promised anything, but I do note that she received a raise of $1.30 an hour, or 23 percent of her hourly rate in June 1989, and a further raise of $.50 in September 1989. Her June raise that year was the highest, but one, of all raises given at that time.

agency and the Board serve identical purposes, but OSHA, like the Board is an investigative agency of the Federal Government, charged with finding and providing remedies for problems in employer-employee relationships prescribed by the Congress. Here, the substance of the OSHA investigation does not really concern us, except in one area, the discomfort level of the Company's aerosol room, but what happened during the investigation gives us some insight into this Company's attitude toward its employees and their rights.

Pam McNew, an employee, testified that the subject of safety in the plant was discussed in at least one union meeting. As a result of this, McNew filed a formal complaint with OSHA on May 15, 1991.

Joan Gates Gearden, an investigator employed by OSHA, testified that she participated in almost all phases of the investigation beginning with a visit to Talsol on May 15, and other visits and meetings on 13 additional days in May, June, August, and October.

On the first day, May 15, Gearden met with John MacLeod, the Company's vice president, and someone named Steve Medlock, otherwise unidentified. MacLeod told Gearden that the Company requested that OSHA obtain a warrant for this inspection, and instructed Gearden to leave the plant.

She didn't leave for long. OSHA obtained a warrant from an administrative law judge, and Gearden returned that same afternoon with the warrant and another OSHA investigator, Ralph Cannon, to initiate their inspection with a ''walk-around'' of the premises. OSHA's practice is to have an employee representative (as well as company representatives, I assume) accompany them on this tour of the premises, Gearden requested Pam McNew. MacLeod said no, that McNew was biased because she was a union sympathizer. The OSHA representatives then walked around the property without an employee representative.

Two days later, on May 17, OSHA polled the employees to select a representative to work with the the agency. Al Isaac, an employee with some 14 years of service was chosen. On the May 18, Gearden came to the plant alone. She was told that Isaac was not working that day. Gearden testified that she heard Dave Blizzard, vice president and director of research and development, say to Teresa Case that she was to give OSHA Mary Robinson as an employee ''and let them deny her.'' Gearden checked with her office, then said she wanted Elaine Jones, another employee. Blizzard said no, that she was a union sympathizer and would be biased. Blizzard then asked Gearden if she was a member of a union. She said she was, and Blizzard charged that she would be biased and would not give the Company a ''fair shake'' because she was a union member. Gearden explained that OSHA was not there to look at union or nonunion issues, but, rather, safety and health issues.

There was a meeting on May 20 between Gearden and Cannon for OSHA, Al Isaac, as employee representative, and Company President Terry Merrill, Blizzard, MacLeod, and Safety Director Teresa Case for the Company. They went over the items in the OSHA complaint. Merrill said that some of the items had no validity. Gearden disagreed, and started to go over them, item by item. One item concerned hearing protection for employees on the aerosol line. Blizzard said that they couldn't get employees to wear hearing protection. Gearden replied that you can have safety and health programs, and, with fair and equitable enforcement, can have employees wear safety equipment, but you cannot use safety and health to punish and harass employees. Blizzard replied, ''[W]hy not? They filed the OSHA complaint to punish us.'' Blizzard again brought up the issue that Gearden and Cannon were union sympathizers and could not, thereby, be fair to the Company.

On May 23, there was another meeting at the Company between Gearden, Cannon, and Isaac and Merrill, Blizzard, MacLeod, and Case. There was a lot of discussion about heat-related problems. Merrill said that the prounion people were working themselves ''out of a job'' because they couldn't do the work. He also said that the prounion people were having heat-related problems, and others were not. At another point in this meeting Cannon was talking about storage problems with flammable liquids. Gearden was looking at Isaac. Merrill interrupted, saying to Isaac, ''Al, Joan keeps looking at you. If you have something to say, say it!'' Isaac didn't answer.

Blizzard accused another employee, Betty Bates, of ''bullying'' the Company into opening the doors in the aerosol room.[7] He felt that the heat-related claims (by employees) were not valid.

In a discussion of internal labeling problems Teresa Case tried to explain the internal labeling situation, but Merrill cut her off by saying ''shut up! These people are not your father confessors!'' Merrill also brought up, more than once, his opinion that his employees were overweight, uneducated, and heavy smokers.

On May 29, Gearden had completed monitoring of temperature and humidity in the aerosol room. Merrill had asked her to stop by at his office before she left. She went to aerosol line Supervisor Pete Burnside and told him that she was finished, that Merrill had asked her to see him in his office, and would Burnside like to accompany her back there. He said no. She knew her way, and started for Merrill's office. She ran into Al Isaac and told him what she had been doing and said she would let him know the results. She continued walking when Blizzard and Case came up to her. Blizzard was ''extremely upset,''[8] and accused her of walking through the plant and talking to employees. He again accused her of being a union supporter and not being fair. He was upset and yelling at her to get out of his plant. She explained where she was going, and went on to Merrill's office.

On May 30, there had been an explosion in the aerosol room when a can of adhesive blew up. In discussing the cleanup with Blizzard on June 10, Gearden said that Blizzard commented that he had had paint and solvent on himself and in his eyes, but he washed it off, and wasn't a union person ''trying to start something.''

This background gives an overall view of a Company whose chief officers are hostile to union activities, sympathies or membership, no matter who is involved, employee or nonemployee; suspicious of malingering without cause; contemptuous of employees; accusatory of the motives of those employees who may be ill, or may have been injured on the job, and ready to retaliate for union activity, against those who may have filed complaints with OSHA, or, it goes without saying, charges with this Board. This ''siege'' neu-

[7] See sec. III,B,2,d, below.

[8] See secs. III,B,2,b, and c, below.

trality permeates all of the issues here, militant and implacable, and completely intolerant of the rights of employees under OSHA, or under Section 7 of the National Labor Relations Act.

As a final note as background to the instant case, the Regional Office sought and obtained a temporary injunction from the United States District Court for the Southern District of Ohio, Western Division, Speigel, J., on March 6, 1991, in Case C–1–91–916, ordering Talsol to cease and desist from assigning known union supporters to the aerosol line in disproportionate numbers and from assigning workers to tasks that far exceed the scope of their typical job duties. So far as the record shows, this injunction is still in effect, but no allegations of failure by the Company to observe its provisions have surfaced in this proceeding.

Turning back to the 1991 campaign, James C. Newport, organizing coordinator for the Union's District 30, testified that he directed the campaign at Talsol in the spring of 1991. Following an initial employee meeting on March 12, Newport sent a letter to Company President Terry Merrill on March 19 demanding recognition, and on the same date filed the petition in Case 9–RC–15872. Newport sent Merrill another letter on March 25 identifying employees Sue Brewer and Curtis Compton as members of an in-plant organizers committee. On April 15, Newport sent Merrill another letter, adding to the in-plant organizers the names of Velvie Wood, Judy Quillen, Pamela McNew, Betty Bates, and Tina Pendergrass. On April 23, Newport sent a third letter to Merrill, naming Teresa Kee, Treasure Chestnut, and Victoria Maxfield, to the in-plant organizing committee.

B. *Alleged Violations of Section 8(a)(1)*

1. Terry Merrill

a. *The greeting card issue*

The complaint alleges in paragraph 5(a)(ii) that the Respondent, by President Terry Merrill, impliedly threatened to close the plant. Employee Connie Robinson[9] testified that, in late March, she was at her work station. Mary Robinson Gruenemeier (another employee, no relation to Connie) was working 5 or 6 feet away, on the other side of a table, Terry Merrill came by and stood at the end of the table and addressed Gruenemeier, telling her that Sue Brewer was one of the ringleaders, adding that Brewer had eight points[10] and would never last until the election. Merrill said that the employees could go back to minimum wage, and they could lose their vacation time, and that the doors could close, ''just like the greeting card company.''

Mary Robinson Gruenemeier stated that she had a conversation in the spring of 1991 with Merrill about the Union, but she said the talk resulted from her concern about what would happen to her job if there was a strike. She had friends who worked at U.S. Playing Card Company and there was a strike at that company, employees were replaced and lost their jobs. So she spoke to Merrill about strike replacements and working during a strike. Gruenemeier said she was alone with Merrill and that he said nothing about Sue Brewer, negotiations, or collective bargaining, wages going back to minimum wage, or closing the plant and that he used no one's name in connection with the Union.

Merrill denied that he had any conversations with Mary Robinson Gruenemeier about any ''greeting card company.'' He denied conversations with Gruenemeier about vacations, minimum wage, or vacation time. In answer to a question as to whether he knew of a greeting card company, Merrill answered ''Yes, Hallmark, Kansas City Missouri. I buy cards there all the time.''

This issue presents kind of a three-sided question of credibility. All of the witnesses to this incident had selfish reasons for wanting this case decided for or against the Company. Connie Robinson is not an alleged discriminatee, so she cannot get her job back through a decision in the case, but she may resent being fired by the Company for missing work while she is claiming that she missed that work because of an injury suffered on the job. Moreover, the injury happened, at least in part, because of a company speedup alleged in this case to be unlawful harassment of employees.

Mary Gruenemeier, on the other hand, is a company loyalist with 14 years of service and a dedication to the Company's interest to the extent that she filed a decertification petition to have the Union removed as collective-bargaining representative at Talsol.

Terry Merrill is the company president, but also, as he described himself, the Company's chief salesman. As president, his testimony is laced with references to production, good business practices, no interference with production goals, demanding performance from all, and fielding complaints. As a salesman he was trying to keep all customers happy in a highly competitive field. Both of these things are admirable, good business, and successful salesmanship. But Merrill also had throughout his testimony a tendency to exaggerate, to dissemble, and perhaps even to fabricate. The idea that he repeated ''4000'' or 10,000'' times a litany about all benefits depending on negotiations, or that an employee who received one warning (Sue Brewer) was warned ''many, many times,'' or another (Curtis Compton) was the subject of many, many complaints; or another was ''1000 percent'' insubordinate, tends to light up a warning signal in the mind of the finder of fact who observed Merrill very, very closely as he testified here.

In respect to this incident I found Connie Robinson to be straightforward in her testimony and by her demeanor she appeared to be candid and truthful.

With Mary Gruenemeier and Merrill I noted a lack of candor in their answers to questions. This was particularly true in regard to the greeting card company point. Connie Robinson testified that Merrill and Gruenemeier talked about a greeting card company. Gruenemeier testified that she did have a conversation about unions with Merrill and expressed her concerns to him about her job and her status in case of a strike. She also testified that she talked to Respondent's counsel about this conversation 4 or 5 months before she testified at this hearing on December 9, 1992, the last day of the hearing.

Merrill's testimony, I find, contained a series of evasive, or dissembling answers, particularly on the greeting card point. Because of this factor, as well as my confidence in the

[9] Robinson was hired in 1989, was injured May 15, 1991, and fired on October 3, 1991. She filed a charge with the Board over this dismissal, but the charge was dismissed.

[10] ''Points'' are demerits given for absence, tardiness, or leaving work early. An accumulation of nine points means discharge.

credibility of Connie Robinson,[11] I conclude that the testimony of Merrill and Gruenemeier was designed to avoid the truth, and that, in fact, Merrill said what Connie Robinson recalled that he said.

Further, I do not believe that Merrill's predictions, as recalled by Robinson, and to a lesser extent by Gruenemeier, are protected by Section 8(c) of the Act. I therefore find that by predicting loss of benefits, plant closure, and loss of jobs, Merrill's statements to Gruenemeier constitute a violation of Section 8(a)(1) of the Act. *Benjamin Coal Co*., 294 NLRB 572 (1989); *Outboard Marine Corp.*, 307 NLRB 1333 (1992).

b. *The remarks to the building A employees*

The complaint alleges in paragraph 5(a) that Merrill threatened employees that Respondent would close the plant if the employees selected the Union as their bargaining representative.

Betty Bates testified that about April 23 she was working in building A with employees Teresa Kee, Connie Robinson, Mary Robinson Gruenemeier, Linda Scarborough, and Tina Pendergrass. Supervisor Larry Parsons called these employees to a meeting where he read from some company literature about the union campaign. Tina Pendergrass raised some questions about what had been said and Terry Merrill, who happened to come by, made some comments to the group. According to Bates, Merrill said they (the employees) were all going to be in for a rude awakening if they thought they were going to ''get anything.'' Everything was going to go his way because ''no damn union was going to come in there and run his company because he had been there too many years to see this happen.'' He pointed to Bates and said that ''You, of all people know I'm one hundred percent anti-union. I want you organizers [Bates and Pendergrass] to hear this from the horse's mouth.'' He said that ''I can take you down to minimum wage or I can take holidays away, no pensions, only myself can give raises or I cannot give raises. It's up to me, not the Union. And if Mr. Newport [union organizer James Newport] tells you this, he's a dirty liar.''

While Bates' testimony is substantially corroborated by Tina Pendergrass, I do not rely on Pendergrass' testimony in this instance. Pendergrass was caught in an egregious lie through careful detective work by Talsol's counsel. As a result, an allegation in the complaint concerning her discharge was withdrawn. The General Counsel argues that this should not operate to cancel out her testimony on other issues, and I agree, but I found Pendergrass to be a witness who indulged in speculation and exaggeration, and I will carefully examine her testimony, in each instance where that testimony is cited in support of a complaint allegation, to determine whether she has indulged in fancy instead of fact. In this instance, I do not find Pendergrass' testimony, where it goes beyond the limits of Bates' version of events, to be reliable.

There is one instance where Pendergrass' account is corroborated to some extent by Terry Merrill. She stated that during his remarks to employees at this meeting Merrill ''threw'' his sunglasses down onto a table. Merrill denied that he threw the glasses down, but, archly, described the glasses as $120, ''Serengettis,'' adding that he didn't slam ''those babies'' down. ''I don't slam $120 glasses down.''

For the rest of Bates' description of his remarks, Merrill denied that he said anything except that ''in collective bargaining, you may get more, you may get less, but basically everything may remain the same.'' He added, characteristically, that he had said that before ''about 4,000 times at least. Maybe 10,000.''[12]

Other than that, Merrill denied making any threats that benefits would be withdrawn or that collective bargaining would be a futile exercise for employees. Larry Parsons corroborated Merrill's version of what he said at the April meeting, although he limited Merrill to 50 repetitions of the same theme rather then 4000 or 10,000. Parsons' testimony was mirrored in the testimony of Mary Robinson Gruenemeier, but Linda Scarborough, another employee called as a company witness, did say that Merrill did speak about the fact that he would do nothing to hurt the Company, and that there were things employees could win or lose, and benefits like wages, or insurance, could go up or down. There was no real corroboration of Bates' testimony, but Scarborough's testimony shows clearly that there was more to Merrill's remarks than that collective bargaining could go both ways.

I find here that Betty Bates told the truth;[13] that Merrill did not, and that the Company has violated Section 8(a)(1) of the Act by Merrill's threatening to reduce wages and benefits; by his stating that he would set wages and other conditions of employment; and that if the Union's organizer said anything else, that organizer was a ''damn liar.'' See, e.g., *Overnite Transportation Co*., 296 NLRB 669 (1989).

2. David Blizzard

Blizzard, who, as vice president for research and development had much more day-to-day contact with employees than did Merrill, was named in the complaint as having done and said a number of things which allegedly violated the Act.

a. *The April 15 incident*

The Company alleges in paragraph 5(b)(i) that on April 15, 1991, Blizzard impliedly threatened an employee with unspecified reprisals if the employee continued to associate with known union adherents. There is no evidence in the record concerning this allegation. There was testimony by employee Teresa Greene that her supervisor, Teresa Case, warned her about associating with hourly employees, but that

[11] Despite her obvious, but understandable mistake in substituting ''greeting'' for ''playing'' in describing the card company.

[12] I do not mean in these findings concerning Merrill's testimony, and his anecdotal responses, to disparage an intelligent, forceful, and successful businessman. Merrill is likeable and personable, and, I am sure, a very successful salesman. I have had, and still have, friends with those qualities, and I had clients who possessed an aggressive pursuit of excellence and success in business, just as Merrill demonstrated in his testimony here. But I must temper personal feelings, of liking or disliking witnesses who come before me, and I must recognize, as does Merrill, that there are things you cannot do, and things you cannot say under this law which governs some of the relations between employers and employees, even when overriding business considerations may dictate actions in a union campaign which are close to the line of illegality.

[13] Again there may have been some confusion in her mind about dates, but I do not find that to impair the effectiveness of her testimony on the events of the meeting.

was in March, and is not alleged as a violation in the complaint.

The Respondent has moved in its brief to dismiss this allegation. In view of the fact that there is no evidence to support it, and no argument in the General Counsel's brief on the point, the motion is granted and paragraph 5(b)(i) of the complaint is dismissed.

b. *The April 26 incident (Compton)*

In paragraph 5(b)(ii) of the complaint, the General Counsel alleges that on April 26, 1991, Blizzard threatened an employee with unspecified reprisals because of his union or protected concerted activities. The employee concerned was identified by the General Counsel as Curtis D. Compton. Compton had applied for a job as a warehouseman, but was hired by the Company as a paintmaker on August 20, 1990. He continued to work as a paintmaker until June 10, 1991.[14] Compton was one of the earliest supporters of the Union from the first meeting on March 12, and he was identified as a member of the in-plant volunteer organizing committee in a letter from Jim Newport to Terry Merrill dated March 25, 1991.[15]

Compton testified that on April 26, Blizzard called him outside of the plant building to talk. Blizzard then said he was sick of Compton's ''bullshit'' and his ''getting people to'' sign or file charges. There were more obscenity-laced statements by Blizzard, and Compton asked if he was threatening him. Blizzard asked if this conversation was being recorded, he pulled up Compton's shirt and noted that he had no wires under the shirt. Blizzard then told Compton that he was not to stand next to any other Talsol employees while on company time and that he wasn't to leave his work area without permission even to go to the bathroom.

Later that day Compton was working and he saw Blizzard standing and staring at him. Compton said, ''What did I do now?'' and Blizzard replied, ''Nothing, I'm just watching you.''

Still later, Compton needed material outside the building, and while he was walking out, Blizzard was walking beside him, saying nothing, but just looking at him. When they got out to where the needed material was, Blizzard told Supervisor Jim Zimmerman, who also was out there, that Compton ''is not to stand next to anybody or go to the bathroom or talk to anybody or leave his work area without you giving him permission.''

On cross-examination, counsel for the Company brought out in his questions a problem between Supervisor Jim Zimmerman and a paintmaker named Dan Reed. As far as this is important to us here, Reed had apparently gone to management complaining about a relationship between Zimmerman and Laboratory Director Teresa Case. One thing led to another, and there apparently was a meeting between Reed, Merrill, and Blizzard at which (again I am inferring what happened at the meeting from counsel's questions to Compton about what happened afterward), Reed said that Compton would back him up in his position.[16] Then, following this meeting, Blizzard had his April 26 set-to with Compton. Counsel also cited a statement from Compton's affidavit to the Board stating that Blizzard said he was tired of Compton's ''bullshit,'' getting people to file complaints (referring to Dan Reed). With this, Respondent argues that Blizzard's tirade at Compton arose out of the Reed affair and had nothing to do with any union or protected concerted activity. The affidavit was not introduced, but on redirect examination the General Counsel did introduce a handwritten statement, the first part of which Compton stated he had written on April 26, 1991, soon after the meeting with Blizzard. In this statement, Compton referred to the meeting between Reed and the management people and went on to describe Blizzard's approach to him and the conversation, substantially the same as to which he had previously testified.

Blizzard testified flatly that he never talked to Compton about Dan Reed, nor about filing charges or stirring things up. He did talk to him about leaving his work area, and told him to stay there.[17] Blizzard denied that he told Compton that he couldn't go to the bathroom, or get a drink of water, but did not deny that he told Compton that he had to ask permission of his supervisor to go to the bathroom or get a drink.

Jim Zimmerman was not asked directly about a directive from Blizzard to him to require that Compton ask permission to leave his work area. But he did say that he never heard anyone tell Compton that he could not talk to other employees, and never heard *anyone* tell Compton that he couldn't use the restroom or get a drink of water without permission.

Blizzard is not an engineer or scientist by way of background, but he has 32 years of experience in the paint business and had owned his own company for about 4 years. He was and is a hands-on manager, familiar with every detail of Talsol's operations, and ready, as it appears from testimony here, to involve himself in employee problems, illnesses, shortcomings, and disciplinary problems. He was characterized by Compton, speaking of a time before the Union come on the scene, as ''rude'' and demanding. His attitude toward the Union is plain from the testimony of a number of witnesses here including that of Joan Gates Gearding, an OSHA inspector whose experiences with Blizzard were described above, see sec. III,A. His preoccupation with slowdowns, sabotage, and threats led him to make decisions such as accusing several employees of a slowdown on no evidence except that production was slow; shutting the doors to the aerosol room and turning off the ventilating fans on the basis of imagined threats; and his attitude toward employees who became ill or were hurt on the job. These are all indications of a real hostility toward the Union and those employees whose names were revealed to him as working actively in the plant for the Union.

Blizzard's reaction to the Dan Reed situation is reflected more clearly in his reaction to Teresa Green's actions after Reed had quit. But from that incident it is clear that the Reed situation had worked him up to a fury, which he blamed on

[14] His problems with the Company around the latter date will be discussed below in sec. III,D,2 of this decision.

[15] Shortly after that Blizzard talked to Compton outside of the supply room. Blizzard said he knew that Compton was in with the Union but he wasn't going to stand for any sabotage or slowdowns. This was not alleged as a violation in the complaint, but it does show Blizzard's preoccupation with what the Union or its supporters might do in the plant or to company property.

[16] The Reed-Zimmerman situation also figures in the discharge of Teresa Greene. See sec. III,C,2, below.

[17] With respect to the earlier conversation about sabotage and slowdown, Blizzard did admit that he criticized Compton for being slow on a job, and told him he was a ''lazy bum.''

Compton. On the basis of his demonstrated hostility toward the Union, and employees who supported it, his preoccupation with the Reed case,[18] his demeanor while testifying, which I found to be defensive, hostile, and less than candid, and, finally, from the fact that, like Merrill's testimony on his talk to employees in April, the questions propounded to Blizzard about his talk with Compton appeared to avoid one of the main points in that discussion, that Compton had to get permission to go to the bathroom or to get a drink. I find Blizzard to be, generally, an untrustworthy witness, and I do not credit his testimony on this incident.

Blizzard's corroborating witness, Zimmerman, did not specifically back up Blizzard's denials, but he too was not asked specifically whether Blizzard had said the things claimed by Compton, but rather whether ''anyone'' had said them.

I found Compton, generally, to be a candid and credible witness. While his testimony on this incident is not corroborated, I do note that key elements in the complaint allegation, the prohibition against leaving one's work station, requiring supervisory permission to attend to personal needs, and attempted isolation within the plant of known union activists, are seen throughout this case. Compton's account of his conversation with Blizzard is logically consistent with the testimony of other credible witnesses on these same subjects, restrictions on movement and contact with other employees.[19]

Accordingly, I find that by imposing more onerous working conditions on Compton, in a context which showed that the imposition of such conditions was the result of Compton's union activity, I find that Respondent has violated Section 8(a)(1) of the Act. See, e.g., *Adscon, Inc*., 290 NLRB 501 (1988); *Heartland of Lansing Nursing Home*, 307 NLRB 152 (1992).

c. *The April 29 incidents (Compton)*

Paragraph 5(b)(iii) of the complaint alleges that Blizzard had threatened to assault Compton because of his union activity.

There was no dispute over the fact that Blizzard did threaten to strike Compton. Nor is there any difference in the versions of each participant as to the immediate cause of the threat, that Compton had touched Blizzard during the course of a conversation.

The differences arise over what preceded the threat, and what happened afterwards. Blizzard stated that he saw Compton working on a job taking 50 gallons of paint out of one container, pouring it into 1-gallon paint cans, and hammering down the lids. According to Blizzard, the job should have taken 40 minutes, but that Compton had already been at it for over 2 hours. Blizzard then called him aside and told him that he didn't want him to slow down on that job. Blizzard admitted that he called Compton a ''lazy bum'' during this conversation, but denied that Compton's union activities had anything to do with his reprimanding him about his work performance. The incident involving the threat happened during this conversation as Compton stood to Blizzard's left and put his arm around Blizzard's shoulder and on his neck. Blizzard moved away but Compton put his arm back on the shoulder. At that point Blizzard said that if he did it again Blizzard would ''slap the shit out of you.''

Compton's version of the day's events included several different incidents. In the morning Blizzard came into Compton's work area and read aloud[20] a letter from management to employees concerning a company called Newport Steel.[21] After reading it, he held up the letter, and said to employees gathered there that ''this is what Curtis Compton wants for you.''

Later, as Compton was walking toward the timeclock to punch out for lunch, Blizzard followed him, calling him a ''shit ass,'' and a ''lazy bum.'' Blizzard continued berating Compton as they walked along.

After lunch, Blizzard came up to Compton again and had a conversation. Compton said that Blizzard said that it was ''a shame'' about what the Union did to Dan Reed, calling his house and getting his wife upset. He said that union people are ''scum, just like you, scum.'' Compton said he laughed and said, ''we're all scum'' and patted Blizzard on the back. Blizzard then said ''don't touch me again'' or he would punch Compton in the jaw. He clenched his fist and they looked at each other. Compton then said that he had no time to play ''silly games'' and walked away.

On the next day Compton was told that he could not leave his car in the front parking lot, but had to move it around to the back of the buildings. Compton said that he was the only one who had to move his car at that time.

As in the previous incidents on April 26 (sec. III,B,2,d, above) I credit Compton over Blizzard. In the only one of these April 29 incidents where any one else was present, Compton identified Jim Zimmerman as being there when Blizzard read the Newport Steel letter, that person was not questioned about what happened. Based on my findings on the April 26 incidents, I credit Compton over Blizzard.

I find that the threat by Blizzard was the result of Blizzard's own antiunion statements, because of a touching by Compton in the course of a furious diatribe by Blizzard, blaming Compton and the Union for the Dan Reed situation, calling them ''scum,'' and acting, according to Compton's description, almost irrationally. Compton's reaction, to evade the confrontation by touching Blizzard, is understandable, and it may be that he shouldn't have touched Blizzard in his excited state. But he did, and the excited state was the result of Blizzard's intemperate and insulting attack on Curtis Compton because of, not in spite of, Compton's union activities. I find that Blizzard's reaction was the result of his own verbal assault, or, possibly, as a device to provoke Compton into a counterattack, which could have resulted in his discharge.[22] I find this to be a violation of Section 8(a)(1) of the Act, *Pepsi-Cola Bottling Co.*, 301 NLRB 1008 (1991).

In addition to the physical threat, I find that Respondent's action is depriving Compton of his customary parking place, is an additional violation set out in section 7(m) of the complaint, a violation of Section 8(a)(1) of the Act. *Adscon, Inc*., supra.

[18] He described Reed as their best paintmaker.

[19] Compton testified, credibly, that he had never been so restricted during his employment at Talsol.

[20] Blizzard admittted reading a letter in a loud voice to employees, but his testimony did not connect that up with the April 29 incident.

[21] According to Compton the letter recounted how Newport Steel had a contract with this Union and had had a substantial layoff.

[22] See the circumstances of Compton's reassignment and resignation, below.

d. *Incidents on April 26 and 29 (Bates)*

The General Counsel has alleged that the allegations in paragraph 5(b)(ii) of the complaint apply to conduct directed against Betty Bates as well as against Curtis Compton. There are two separate sets of facts in these two situations which are alleged to have occured on April 26, but since these matters were fully litigated at the hearing, I will treat the allegation as to Bates as a separate incident, but covered by the same complaint allegation.

As noted above, Betty Bates volunteered her services as a company agent at the 1988 Teamsters union campaign at Talsol. For this service she apparently received two pay raises during the next year.[23] Later, however, she was demoted and her salary was cut. This angered her, and, when the new union campaign began in March 1991, Bates attended meetings, signed a union authorization card, and her name was listed as an in-plant organizer in a letter of April 15 from Jim Newport to Terry Merrill. This change of loyalties caught the attention of Merrill who, at the meeting of April 23, pointed his finger at Bates, saying ''You, of all people, know I'm 100 percent anti-union.''

Then, on April 24, Bates and Teresa Kee were moved to the aerosol line. On April 26 Bates was working in the filler room on the aerosol line.

Blizzard saw her there, and told her that she had had it easy, but now she was going to work. He then said that he couldn't understand why she went from the Company to the Union. She told him that she had been demoted after being so loyal to the Company, and she had money taken away from her, so why else wouldn't she go the Union. He replied, ''That's not all we're going to do to you.''

Blizzard placed this conversation on April 29, but admitted that he asked Bates at that time why she changed sides, and she replied that it was because the Company had cut her pay. Blizzard denied that there was any more conversation at that time.

Here, again, we are faced with a direct issue of credibility. Looking first at Blizzard's credibility, I have found serious questions on that point. His testimony was found to be less than credible in the incidents involving Curtis Compton. One of the points on which that determination turned was Blizzard's emotional and personal hostility toward the Union and its adherents. Even before this Union came on the scene at Talsol, however, Curtis Compton described Blizzard's personality as flighty, changeable, and many times rude, angry, or both. After all, Blizzard's job was not easy, trying to get production out, to maintain quality, to check employees' performance, absences, illnesses, and idiosyncrasies, and to answer management demands, some perhaps, difficult or unreasonable. With an excitable and defensive nature, with the coming of the Union, and with what I think I can reasonably infer was pressure from Merrill to take care of the union problem, I can understand Blizzard's frustrations with events. Understanding, however, does not mean that I can condone outbursts, threats, reassignments, groundless accusations, and forcing work under novel and burdensome conditions, all to try to halt or slow down the union campaign. If Blizzard's words and actions have violated the law, I must find these violations and attempt, insofar as the law allows me, to recommend remedial actions for such violations.

All of this is preparatory to looking at Blizzard's conversation with Betty Bates on April 26.

At the same time, I must also look at Bates' credibility, because she was a witness to many of the events alleged in the complaint as violations of the Act.

Bates' credibility was attached by Respondent on a number of points. As noted above, Bates engaged in espionage for the Company during a 1988 union election campaign. For reasons which are not explained on the record, but which may reasonably give rise to an inference that her services to the Company in that election were a contributing factor, Bates was given a raise of $1.30 an hour, or 23 percent of her then current hourly rate, in June 1989, and a further 50-cent raise in September 1989.

Respondent points to a series of five warnings given Bates in the period before the current union campaign to portray her as having a ''history of discipline for performance problems'' in 1989 and 1990, resulting in her demotion in September 1990 with a loss in pay. The first of these warnings was an Employee Disciplinary Report dated March 15, 1989, for returning 10 minutes late from lunch, some months before her two pay increases in 1989. The other alleged disciplinary reports were dated on November 7 and 9, 1989, dealing with the need to request approval for overtime work; and two other reports involving two errors in shipping dated December 14, 1989, and July 13, 1990.

There is no other documentation for Bates' demotion, and it is hard to imagine this Company demoting an employee and lowering her pay for 10 minutes of tardiness 18 months earlier; two admonitions about the need to ask permission in advance to work overtime 10 months earlier; a reprimand for a shipping error 9 months earlier; and finally, a reprimand for a shipping error 2 months before the demotion. I do not know what the reasons were for the demotion, but in the absence of legitimate business reasons, I cannot accept these disciplinary actions by the Company as grounds to discredit Bates' testimony.

Respondent in its brief also relies on the fact that ''Bates has a financial interest in her crusade against Talsol. She has filed a lawsuit seeking $1 million in damages from Talsol, Merrill, Blizzard, Burnside and Parsons for the same allegations involved in this case.'' Respondent's brief omits the facts that Bates' direct testimony here began on January 31 and concluded on May 26, 1992, almost 2 months before the lawsuit was filed in July 1992. At the time of her testimony (until recalled by Respondent as its witness in December 1992), she had no current financial interest in any lawsuit.[24]

I have no doubt that Bates felt herself ill-used by the Company in her demotion, and in the treatment she (and others) received during the period of the union campaign in 1991, but I do not think that those feelings in and of themselves are causes to discredit her testimony.

Several additional instances of ''duplicity'' are put forward by Respondent to attach Bates' credibility. The first refers to Bates' experience as a company ''fink,'' or ''snitch'' in the 1989 Teamsters campaign. Bates admitted this, admitted that she expected this activity to further her own interests, and expressed her disappointment that it didn't work out that way, except in the short run. I have already considered

[23] Sec. III,A, above.

[24] If, indeed, a lawsuit filed in a state court on the same issues as in this Labor Board case has any legal viability.

this in my evaluation of Bates' credibility. It is not the first time that an employee has switched sides in ongoing labor-management conflicts. The switching is always done for personal motives, and I see no reason to discredit any witness for this kind of conduct, unless something else tips the scales.

Second, is an accusation that Bates agreed to corroborate a story by Tina Pendergrass that the latter had called the Company to report that she would be absent. Bates did not include a conversation with Pendergrass in a journal which Bates kept during the union campaign. But the portion of the transcript included in Respondent's brief to prove Bates' mendacity does not include the full exchange between Bates and counsel, in which Bates did try to explain what she had done, with a separate piece of paper not included in her journal. Bates did not, as I see it, admit her ''complicity to Pendergrass' perjury.''

A third allegation made by Respondent is that when Ernest Fultz' claim of union discrimination was ''failing'' because there was no evidence that the Company knew anything about his supposed union activities, it was Bates who ''suddenly'' remembered a conversation with Blizzard and provided the evidence needed for the case. The basis for this allegation is that Bates had omitted the conversation in one affidavit she had given. The statement that ''she made it up'' is not warranted by the record in this case.

Finally, a more serious charge is that Bates falsified her employment application at Talsol by omitting references to her prior employment at Kroger (a grocery chain), from 1980 to 1984. When she applied for a job at Talsol on April 9, 1986, she did not put down her previous employment with Kroger. When asked by counsel for Respondent, she admitted that she had worked for Kroger from 1980 to 1984. During the latter part of her employment with Kroger she was the restaurant manager at Kroger's Fairfield store. In November 1984, Bates was suspended from her employment under the following circumstances: She had ordered two party platters (sliced cold cuts, potato salad, etc.) and when she paid, she told the cashier to charge her for the food only and not for the labor used in making up the platters.

A result of this, when it was discovered by Kroger's management, was that Bates was suspended and, according to her, she was told to write a statement that what she had done was wrong.

On the basis of this recounting of the evidence the Respondent argues that by signing her application at Talsol without mentioning this, or any reference to Kroger, she certified her application was ''true and complete—a bold face lie'' in a situation where the application itself states that any false ''statement shall be grounds for dismissal.''

Respondent has not told the whole story in its argument. Omitted were Bates' testimony that she did not consider what she did at Kroger to be wrong; that she and others had done the same thing before; that she was coerced into signing the statement admitting guilt; that she and her union representative discussed the matter and they decided that rather than pursue the matter (presumably through the grievance procedure) she would resign; and that she gave a statement to the union covering the incident as I have described it here.

With respect to her application, she testified that she considered her resigning from Kroger, and the circumstances surrounding it, a ''bad experience'' and she didn't feel it necessary to put it down on her application at Talsol.

I can understand Bates' reluctance to reopen an unpleasant chapter in her life, but I certainly cannot condone, or explain away, what must have been a conscious effort, not at lying, but at dissimilation. I observed Bates carefully, however, during direct examination, and vigorous, even bruising, cross-examination, and I am convinced based on her demeanor while testifying, by the logical consistency of her testimony with other employee witnesses I have credited, or will credit, and the inherent probabilities of her testimony as weighed against, or with, all the other testimony here, that in spite of her attempt to avoid embarrassment by not including the Kroger employment on her Talsol application, that she was a credible witness.

Accordingly, crediting Bates' testimony against that of Blizzard, I credit her version of that April 26 conversation and find that by Blizzard's threats to retaliate against Bates for her support of the Union, Respondent has violated Section 8(a)(1) of the Act.

Since Bates testified that Blizzard repeated the same or similar threats to her on April 29,[25] and since, in regard to this incident, Blizzard did admit that he asked Bates why she switched and she replied that it was for the money, and since I credit Bates over Blizzard, I find a further violation of Section 8(a)(1) of the Act.

e. *Incidents on May 10*

The complaint alleges in paragraph 5(b)(v) that about May 10, Blizzard created an impression of surveillance on an employee; to the effect that the employee's actions were under surveillance by the Company; that he coercively interrogated an employee regarding union activities; and that he impliedly threatened an employee with unspecified reprisals if the employee filed unfair labor practice charges.

All of this arose out of a conversation between Blizzard and Connie Robinson on the morning of the union election, May 10. Robinson testified that on that morning Blizzard came by her work station and sat down. He said that he understood she was for the Company until she saw the police and then changed her mind.[26] Robinson told Blizzard that she had told nobody how she was going to vote. He then called her a ''damn liar.'' She repeated that she never said how she was going to vote. Blizzard then accused her of starting ''all this shit'' so the Union could get in and she could cause trouble. By this time Robinson was crying, but Blizzard continued on, accusing her of saying that the Company had phoned and threatened her. She denied this, and he said that Supervisor Larry Parsons had told him. She replied that she did not remember telling Parsons, but she did tell her sister, Bonnie Wilson.

Later, Robinson asked Parsons if he had told Blizzard that she had said these things. Parsons said no. Blizzard then came up and called her a ''dirty, low-down, low-life.'' Later, Parsons told her that he ''had things all straightened out.''

Robinson's testimony was corroborated by her sister, Bonnie Wilson. Wilson testified that on May 10 she and Robinson were in building A doing shrink wrapping. Bliz-

[25] As alleged in par. 5(b)(iv) of the complaint.

[26] The Company had hired city police to guard the premises on the day of the election because of a claimed fear of violence.

zard came by and sat about 5 feet from where Wilson was working. Addressing Robinson, Blizzard said to Robinson that she had started ''this shit'' so the Union could come in. She said that she didn't know what he was talking about, and he said that Larry Parsons had told him that she had pretended to be for the Company so the Union could come in. She denied this. Blizzard called her a ''damn liar'' and added that if she or anyone else tried to bring charges against him they ''would be very sorry.''

Blizzard testified about his May 10 conversation. He said he had heard Robinson was telling people that management officials were calling her house all night to harass her. He told her she was lying. She said she didn't say that, and he called her a ''damn liar.'' Replying to a series of questions as to whether Robinson's union activities were mentioned or the election or accusations that she made up statements to stir things up so the Union could get in, or daring her to file charges or anything about charges, Blizzard answered each issue with a monosyllabic ''no.''

Blizzard did not say who had told him that Robinson was telling people that management was harassing her. Larry Parsons, who had a conversation with Robinson earlier that day, testified about some other things he and Robinson had said to each other, but there was no mention of threatening telephone calls.

If Blizzard had talked to anyone about this incident, he should have told us who it was. If he was basing his attack on Robinson based on rumor,[27] then his reaction seems of a piece with his frenzied responses to other manifestations of union activity or activities not clearly in favor of the Company's position on unionization. In any case, I credit Richardson's story, and I believe Blizzard only to the extent that he admitted calling her a ''damn liar.''

I, therefore, find that Respondent violated Section 8(a)(1) of the Act by (1) giving the impression of surveillance by accusing Robinson of being prounion while feigning an antiunion attitude and by accusing her of making anti-company statements; (2) in this same conversation, Blizzard coercively interrogating Robinson by accusing her of changing her mind about the Union; and (3) by threatening her with unspecified retaliation if she filed charges against him.

f. *Incident on May 15*

Paragraph 5(b)((vi) alleges that about May 15 the Respondent impliedly threatened an employee with discharge because of the employee's union or protected, concerted activities.

Tina Pendergrass testified that she was on her way to the timeclock when she exchanged a few words with Curtis Compton. She then punched in and went to work on the boxing end of the aerosol line. Blizzard, Pete Burnside, and Larry Parsons came over to where she was working and Blizzard said he had heard what Compton said to her, to let the cans back up until they fell on the floor. Pendergrass tried to explain, but Blizzard said she was covering up for the Union and if one can fell on the ground, she would be fired. He told Burnside to start and watch her. If one can fell, take her into the office and take care of her.

Blizzard denied ever having this conversation. As noted above, I have real problems with Pendergrass' credibility. It may have been noted that I have had problems with Blizzard as well on that score. In this situation, therefore, since there is no corroboration or denial by any of the other people involved, Compton, Burnside, or Parsons, I do not feel that a preponderance of the credible evidence will allow me to find a violation. I will recommend that paragraph 5(b)(vi) be dismissed.

g. *The May 24 incident*

Paragraph 5(b)(vii) of the complaint alleges that the Respondent threatened an employee with more onerous working conditions because of the employee's union activity.

An employee named Treasure Chestnut, who had been active on the in-plant organizing committee, testified that she was transferred to the aerosol room on April 29. On May 15 she tripped over an electrical cord and was injured. She was released by her physician and came to the plant to arrange her return to work on May 24. She met with Blizzard and Larry Parsons in the Company's conference room. After some conversation about her date of return, Blizzard told her that she had to come back on May 28 and would have to schedule any continuing therapy before or after work. Blizzard then told Chestnut that he was going to give her some advice: her friends could get her in trouble. He said, for example, if she was walking down a street with them and one of them pulled a gun and she was with them, that she could go to prison for the same thing. He then told Chestnut that she would go back to the job she had been doing, or a harder one, and it probably would be a harder one.[28]

Blizzard testified that he talked to Chestnut with Larry Parsons[29] present, in the conference room late in May. He maintained that he told Chestnut that she would come back to the same job she had before she was hurt. He denied that he talked about a harder job, or warned Chestnut about her friends or associations, or about friends committing crimes. Parsons did not testify on this incident.

I found Chestnut to be a frank and candid witness. She was open and truthful, so far as I could discern from her demeanor while testifying. The Respondent in its brief maintains that it ''makes no sense'' for Blizzard to tell Chestnut she would come back to a harder job, and that since company policy provides that injured employees return to their old job, ''it would make no sense for Blizzard to say anything different.'' My own impressions of Blizzard are that a lot of what Blizzard said or did during the period of the union campaign was angry almost hysterical, and, indeed, made little sense during the campaign in helping the Company win the election, and not much sense afterward, even if intended to wear down the employees' loyalties to the Union. I reject this argument by Respondent, and I find that Blizzard did threaten Chestnut with assignment to a harder job, and did warn her that her friends, I infer that those ''friends'' were union friends, could get her into trouble. I find that this conduct violated Section 8(a)(1) of the Act.

[27] As stated in Respondent's brief.

[28] As it turned out, she went back to the same job she had when she was injured.

[29] The record says ''Erie Parson,'' but that is an obvious error.

h. *The incident of May 29*

In paragraphs 5(b)(vii) the complaint alleges that on May 29 the Respondent threatened an employee because of the employee's union or protected concerted activities.

Blizzard testified that on May 28 Bonnie Wilson was working in the aerosol room and she became overheated. Blizzard saw her and took her to his air-conditioned office, gave her some water, and allowed her to stay for an hour or so. On the next day, May 29, Blizzard came by about 1:30 in the afternoon and saw Wilson sitting on a pallet. Her face was red and she was holding a wet towel up against her head. He asked her if she was ill or if she wanted to go to the clinic. She said no and he asked Burnside to watch her for signs that she was ill.

Wilson admitted Blizzard's kind treatment on May 28, but on May 29, her story was different. On May 29 Wilson testified, she was having lunch out at her car, parked on the street opposite the plant entrance.[30] She was talking with Treasure Chestnut, Curtis Compton, and Linda Page, a union organizer. Terry Merrill and Dave Blizzard drove by them and pulled into the parking lot. According to Wilson, Merrill pointed his finger at her and the people with whom she was conversing. After the car was parked, Blizzard got out, walked out to the curb on the plant side of the street, and stood for 5 minutes or so with his arms crossed looking at the employees.

Wilson went back into the plant, washed her face, and went to the aerosol room waiting for the buzzer to ring. She said nothing about holding a towel or whether she felt hot, or her face was red. Wilson then said that Blizzard said to her, ''Oh, poor little sick girl. I saw you and your union friends out on the street, plotting.'' He then told her that ''little girl'' (referring to OSHA investigator Joan Gates Gearding) was coming back that day. Blizzard then told Pete Burnside to watch Wilson and not take his eyes off her that she was up to something and they would take care of her later. After the OSHA investigator arrived, Blizzard called Wilson over to Burnside's desk and told her that ''they'' were watching her and warned her not to talk to the OSHA investigator. Later Wilson was sent to the file room.[31]

I credit Wilson's testimony that Blizzard accused her of ''plotting'' and told Burnside, in Wilson's presence, that they would ''take care of her'' later. Blizzard was certainly considerate to Wilson on May 28 and might have been on the May 29 as well, but his actions, when Wilson announced on May 29 that she was all right, are completely in character with his treatment of employees and with his admitted hostility toward OSHA, its employees, and Talsol employees who may have been responsible for calling down OSHA on the head of the Company. I find a violation of Section 8(a)(1) of the Act in Blizzard's threat to Wilson that ''they'' would ''take care of her later.''

[30] The Company is concerned about the quantities of volatile solvents and other flammable materials in the plant and under the ground outside the plant. Therefore smoking is not permitted anywhere in the plant or on the grounds. Those who want to smoke take their breaks across the street or somewhere else off the premises.

[31] Burnside did not testify about this incident.

i. *Incidents of surveillance on the street opposite the plant*

The complaint alleges in section 5(l) that on various dates in late April and May, Dave Blizzard engaged in surveillance of employees' union activity on Devitt Drive near the plant. In section 5(f), it is alleged that Blizzard, Terry Merrill, John MacLeod, and Teresa Case engaged in unlawful surveilance on May 29 on Devitt Drive across from the plant. These two allegations are treated together here.

I have already recorded in section III,B,2,h, above, Bonnie Wilson's description of the actions of Blizzard and Merrill on May 29. I also note the testimony of Velvie Wood that she observed Blizzard standing at the end of the driveway and looking up and down the street for several minutes while employees and union agents were there. Treasure Chestnut said she saw Blizzard standing in the driveway and looking at employees and union agents in or around cars parked there. Blizzard was also observed going between buildings on the Company's property while employees were out on the street.

The General Counsel has correctly stated the Board's views on this are that employees who choose to engage openly in union activities cannot be heard to complain if management observes them. *EDP Medical Computer Systems*, 284 NLRB 1232 (1987). There would be no violations here unless the management observers did something ''out of the ordinary.'' Here, according to employee witnesses, Blizzard varied his usual routine only by walking down to the end of the driveway and standing, with folded arms, while employees and union agents were across the street. I see nothing ''out of the ordinary'' in this, company officials could see all this from inside the plant and the employees made no effort to conceal their actions from management. I recommend that these allegations of the complaint be dismissed.

j. *The April 29 incident*

The complaint alleges in paragraph 5(i) that Blizzard impliedly threatened an employee with unspecified discipline if the employee continued to talk to a known union adherent.

Betty Bates testified that on April 29, before she became ill and had to leave the plant, she was pulling a fully loaded skid (or pallet) out of the aerosol room with a skid jack. Curtis Compton was out in the area where she was taking the skid. Bates said nothing to Compton, but when she came back to the aerosol room, Blizzard accused her of ''talking to Curtis,'' told her to stay in the aerosol room, and that she was not to come out of there. In his testimony Blizzard said nothing about this conversation.

Again I credit Bates. There was no business reason advanced by Respondent why Bates, in the course or her employment, could not encounter and talk to another employee in the course of his employment. From the testimony it was clear that neither employee interrupted their work. If work had been interrupted, Blizzard's reaction, looking at his activities here, would have been much more excitable than merely giving a warning not to talk. I find this action, forbidding one employee to talk to another, even though they were both known union adherents, a violation of Section 8(a)(1) of the Act.

k. *The late April incident*

Paragraph 5(j) of the complaint alleges that the Company through Dave Blizzard promised an unspecified benefit to an employee if that employee voted against the Union.

Pam McNew testified that about 2 or 3 weeks before the election, Blizzard came up to her while she was working on the aerosol line night shift. He started helping her with her work and said to her: ''What can I do to change your mind, to make you come over to the Company side?'' She replied, ''Nothing.''

Blizzard did not mention this conversation in his testimony, although Respondent, in its brief, points to his statement that he ''couldn't talk about changing jobs within the Company.'' He also said that he and she had teased each other many times during her employment.

I could not find any reference to this allegation in the General Counsel's brief.

I have had problems, as noted, with Blizzard's credibility, and I think McNew honestly reported what he had said to her. But in the circumstances, where Blizzard and McNew had had a little fun in their relationship, and because of the vague nature, neither threatening or promising, of Blizzard's statement as reported by McNew, I will recommend that this allegation be dismissed.

3. Larry Parsons

Larry Parsons is the packaging superintendent for buildings A and B. He had worked for Talsol for 4-1/2 years at the time of the hearing. Parsons is alleged in the complaint to have been involved in several violations of the Act.

a. *The May 10 incident*

The complaint alleges in paragraph 5(c) that the Company violated Section 8(a)(1) of the Act about May 10 by threatening an employee with loss of a job if the employees selected the Union in that day's election.

Connie Robinson testified that, on May 10, that she told Parsons, who was her supervisor, that she had made her mind up (as to the way she was going to vote). (See sec. III,B,2,e, above.) About an hour later Parsons called her outside the building. They were alone. Parsons said to her that he hoped she had made up her mind for the Company. She said it was her own private right how she was going to vote. He told her she could be ''the hero,'' that she should think of Linda Scarborough and Mary Robinson because they both needed their jobs.

Parsons said in his testimony that Robinson had told him that when her two married sons had children, she would quit her job at Talsol to babysit for her grandchildren. She had also said earlier in the year that her two daugthers-in-law were pregnant. Parsons said he was referring to her intention to quit when he told her that she ought to weigh the issue of her vote differently from other employees. She would not be there to ''reap benefits or consequences'' of a union victory. She should decide on what was best for her fellow employees, mentioning Mary Robinson, Linda Scarborough, and Betty Dishion. Parsons denied that he said that Mary Robinson or Linda Scarborough, or any employees, might lose their jobs.

In this case we do not have the total contradictions in testimony that we observed with the incidents above involving Blizzard and Merrill. Robinson and Parsons are in substantial agreement about almost everything—the conversation took place, Parsons spoke to her about her vote but did not ask her how she was going to vote; he did attempt to persuade her, because of her (undenied) wish to leave the Company voluntarily when her grandchildren were born, to vote for the Company since her coworkers would still be employed after she was gone.

The one thing she said he said, and which he denied saying, was that Linda and Mary needed their jobs, a statement denied by Parsons.

This is a close call, but I have found Robinson to be a candid and frank witness and I find that Parsons did say, as she testified, that Linda and Mary needed their jobs. I find this to be an implied threat and a violation of Section 8(a)(1) of the Act.

b. *Another May 10 incident*

The complaint alleges in paragraph 5(d) that the Company, through Parsons and Jim Zimmerman, coercively interrogated an employee concerning that employee's union sympathies.

Employee Elaine Jones had worked at Talsol since November 1987. There is no indication that she worked for or was active in the union campaign before the election. Jones testified that Parsons came up to her late in April and asked her how she thought the vote was going to go. She said she had no comment and he said he thought the Union would get in this time.

About a week before the election Parsons called Jones outside and said he thought she would be a good observer for the Company at the election and that she would be honest and fair. She agreed to serve and Parsons told her that she should see Company Vice President John MacLeod on election day to receive her instructions.

When election day came, however, Jones was again called outside, this time by Parsons and Jim Zimmerman. Parsons said to her that since she hadn't told them that she was 100 percent for the Company, ''we're going to get someone who has.'' Jones accepted this, adding that she didn't have to tell them anything. Parsons agreed with this.

Parsons placed the conversation on May 8, but his testimony is in substantial agreement with that of Jones. Parsons testified that he told her he did not want to hear how she intended to vote, and Jones agreed with this in her testimony.

Neither party has cited me any authority for its respective position on this issue. The General Counsel argues that Parson's comments to Jones that she hadn't told the company people that she was 100 percent for the Union is implied interrogation of her. I don't agree. It seems to me that the Company is entitled to have an observer whose sympathies are 100 percent with the Company. If this Company does not want someone who, in Parson's words, is ''fair and honest'' they are entitled to reject that person. I will recommend that this allegation in the complaint be dismissed.

c. *Incident of August 19*

The complaint alleges in paragraph 5(n) that, on August 19, Larry Parsons threatened an employee with a ''point'' under the Company's attendance policy[32] for attending a

[32] Unexcused absences give employees a ''point'' for each full day. Accumulation of nine points results in discharge.

meeting called by OSHA, and in paragraph 7(z) that the Company proceeded to issue the employee a point and dock his pay for attending the OSHA meeting.

At the time of this hearing, Al Isaac had worked for the Company for 14 years. He was an all-round employee who could perform most jobs in the plant. Isaac had not participated in any union activity, but in April he was transferred from day to the night shift, where he remained until after the election. On the day of the election, Dave Blizzard mentioned to Isaac that he heard Isaac wanted to go back on first shift. Blizzard also asked Isaac if he had voted for the Company. Isaac said he had, but Blizzard, characteristically, replied by calling Isaac a ''lying ass.'' After further discussion, when Isaac said he would sign a sworn affidavit that he had voted for the Company, Blizzard said they would see about getting him transferred back to first shift. He was later transferred back to the day shift.

On May 16, during the OSHA[33] investigation, Isaac was selected as an employee representative to participate in the OSHA investigations and conferences concerning this investigation.

In August Isaac was notified by OSHA that there was to be a meeting at the OSHA office in Sharonville, Ohio, about 3 or 4 miles by road from the plant. Isaac presented the letter to Parsons and asked if he would get a ''point'' if he left the plant to attend the meeting. Parsons told him that company rules allow an excused absence for response to a subpoena, but since this was a letter and not a subpoena, that the rule did not cover it and Isaac would get a point. Isaac went to the meeting, was given a point, and was not paid for the time spent at the OSHA meeting.[34]

It is my understanding that this allegation involves a violation of Section 8(a)(1) of the Act, and not Section 8(a)(4).

There is no dispute about what happened here, and I find that the statement by Parsons that Isaac would receive a point if he attended the meeting. The award of the point and the nonpayment of wages are all violations of Isaac's right to engage in protected concerted activity under Sections 7 and 8(a)(1) of the Act. *Unico Replacement Parts*, 281 NLRB 309 (1986).

4. Jim Zimmerman

Zimmerman has been the superintendent of manufacturing since December 1990, and held that position throughout the events which make up this case.

a. *The March 12 incident*

The complaint alleges in paragraph 5(h) that Respondent threatened an employee that any knowledge of union activity could cost the employee his job.

Ernest V.C. Fultz was employed by the Company first in September 1990 as an apprentice paintmaker. He quit in January 1991, but came back later in that month and was rehired as a general laborer and janitor. Fultz attended the first union meeting on March 12, signed a card, and took cards for others to sign. He ate lunch every day with Curtis Compton in Compton's van parked across the street from the plant (the smokers' side of the street).

On March 12 Fultz had a conversation about the Union with Jim Zimmerman. According to Fultz, Zimmerman had approached him while he was cleaning the blades of a mixing tank. Zimmerman asked him if he knew anything about the Union, and Fultz replied that he did not ''at that point in time.'' Zimmerman then said, ''Keep it that way. If not, it could cost you your job.''

Zimmerman's version of the incident was that he had one conversation about the Union with Fultz sometime before April. Zimmerman said that Fultz started the conversation by saying to Zimmerman that he wanted Zimmerman to know that he wasn't the least bit interested in the Union. Zimmerman replied that it was up to him, it was his choice. Zimmerman denied that he ever asked Fultz whether he knew about the Union, or that he told Fultz that if he did not know about the Union he should keep it that way, or that knowledge about the Union could cost him his job.

Fultz is young but his demeanor gave an impression of sincerity. He had left the Company and was hired back, which speaks well for the quality of his work. Blizzard, who rehired him, told Fultz that he liked his work performance. I have a problem with Fultz' recollection that the conversation with Zimmerman took place on the day of the first union meeting, which must have occurred late in the afternoon or in the evening, but I can and do infer that there was union talk around the plant even before that first meeting. There must have been some notice of the March 12 union meeting distributed, if only by word of mouth, so that people would know where and when the meeting was going to be held. I have another problem with Fultz' statement that he had his lunch daily in Compton's van. I recall that Compton was upset, and the General Counsel has made an allegation in this complaint about Compton parking his van at the side of the plant and being forced to move it down to the back of the plant. But this incident happened in March, and Compton was not required to move the van until April 19.

Zimmerman was not a credible witness. He appeared to me to have a furtive, less than frank manner, and like other company witnesses seemed to confine his answers to monosyllabic yeses or nos in response to (unobjected to) leading questions. If the question is not objected to, the answer certainly can go into the record, but the weight accorded such answers is traditionally, and is here, much less than if the answers were not suggested in the questions.

I find that Zimmerman's remarks to Fultz on March 12 constitute a threat in violation of Section 8(a)(1) of the Act.

b. *The April 15 incident*

The complaint alleges in paragraph 5(e) that Zimmerman threatened an employee with discharge if the employee engaged in union activities.

Fultz testified on another conversation with Zimmerman at some time before his discharge, which occurred on April 18. I accept the General Counsel's assertion that this conversa-

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[33] See above, sec. III,A of this decision for more on the OSHA investigation and its ramifications affecting this case.

[34] Respondent has represented in argument and in its brief that it has removed the point and paid Isaac what he would have earned if he had remained at work on August 19. My findings here do not depend on this action, however, and questions of backpay should await the compliance stage of the proceeding. On December 4, however, Isaac was fired for excessive absentee points, one of which was this one he received in August. He was immediately reinstated and that discharge is not alleged in the complaint as a violation of law.

tion was about April 15. According to Fultz, he was talking to Zimmerman about some company literature involving the Union. He asked Zimmerman why the literature had only what the Company wanted them to hear. He added ''at least the Union doesn't lie to us,'' and said that he wasn't sure, but he was looking for another job. Zimmerman asked him who paid him, the Company or the Union? Fultz replied that the Company did, ''but just barely.''

Zimmerman did not testify about this conversation.

On the basis of Fultz' testimony alone, I do not believe that there is any showing that Zimmerman said anything which would constitute a threat, as alleged in the complaint. All Zimmerman asked was who paid Fultz. There is no threat in this question, certainly no threat of discharge. I, therefore, recommend that this allegation of the complaint be dismissed.

5. Conrad (Pete) Burnside

Pete Burnside was the supervisor over the aerosol line. He was employed when the line was installed in mid-1990 and was still there when he testified here on December 8, 1992.[35]

a. *The August 30 incident*

Paragraphs 5(m)(i) and (ii) allege that on August 30 Respondent, by Pete Burnside, denied a request by Tina Pendergrass to be represented by the Union during an interview, and that Pendergrass had reasonable cause to believe that discipline would result from the interview.

Pendergrass testified that on August 30 she was working on the aerosol line and she had to use the restroom. She told the quality control employee (who filled in for emergencies on the line when employees felt ill or had to go to the restroom) of her problem and that person looked for Burnside, couldn't find him and returned, relieving Pendergrass and asking her to look for Burnside. Pendergrass couldn't see him after looking all over the aerosol room. She returned and told the quality control person, and the latter told her to go ahead to the restroom.

When Pendergrass came out of the restroom, there was Burnside, yelling at her and saying that he was ''going to get rid of my ass.'' He told her again that he was going to get rid of her ''ass'' she wasn't allowed to use the restroom; that he ran that place; and she was going to be written up. She replied that she was going to tell OSHA and the Union.

Pendergrass went back to work. Burnside came by and told her to go to the foreman's office. Before she went in to the office she asked for union representation[36] and was refused. Burnside told her that the Union didn't run this place, they did, and that things were not going to change. Larry Parsons, who was in the room, told Burnside to wait a minute. Pendergrass said she heard Parsons calling John MacLeod over the intercom. Parsons then came back and said she wasn't entitled to union representation. This was not, Parsons said, an investigation. She had already been found guilty.

On the next day, Pendergrass got a written warning. She disagreed with the conclusion and wrote her dissent in the warning. The matter then went, according to company procedure noted in this case, to Terry Merrill. Merrill agreed with the finding of violation of leaving the work area without permission, and ordered a 3-day suspension for Pendergrass.

Burnside testified about this incident. He was shown a copy of the Employee Discipline Report (G.C. Exh. 44) and his entire testimony about the incident was as follows:

> Q. (By Respondent's counsel) I'll show you General Counsel's Exhibit 44. Can you identify that?
>
> A. Yes, I can.
>
> Q. What is that?
>
> A. This is a disciplinary report for Tina Pendergrass—also leaving work area without permission.
>
> Q. Is this the same problem you had with her before that led to the earlier discipline?
>
> A. Yes, it is.
>
> Q. Did her union activities or sympathies have anything to do with your Decision to issue that?
>
> A. No, they did not.

Burnside did not testify about Pendergrass' request for union representation, nor did he mention what he had said to her before bringing her into his office. Neither Parsons nor MacLeod testified about this incident.

In its brief Respondent admits that ''a technical violation probably occurred'' in this interview. The Company's brief asserts that ''although the Company had finished its investigation, the interview might have been technically investigatory because the Company asked Pendergrass to sign the disciplinary form and gave her the opportunity to write her comments.''

My own feeling is that the interview was investigatory because the form which was used by both Burnside and, the next day, by Pendergrass was not even prepared at the time of the interview. Thus, the interview was a forum for the laying of a charge, in this case, leaving the work area without permission and an opportunity for the charged employee to make an explanation. Moreover, no discipline was ever imposed, from my viewing of the forms introduced in this hearing, until Terry Merrill determined what discipline would be imposed. Thus, any stage up to Merrill's decision can be considered merely part of the investigation. I find that in these circumstances, the mere statement by a supervisor that an employee is going to be written up does not constitute a decision to discipline, and the employee in such a situation is entitled to union representation during a subsequent interview. *NLRB v. Weingarten*, 420 U.S. 251 (1975); *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979). The disciplinary action taken, and the denial of union representation, are both violations of Section 8(a)(1) of the Act.

b. *The November incident*

The complaint alleges in paragraph 5(o) that the Respondent, through Pete Burnside, threatened an employee with dis-

[35] Since there is so much in this case which arises out of the history and functions of the aerosol line, the transfer of employees to the line, and the treatment of employees working on the line, including the allegations in par. 5(k) of the complaint, I will discuss all of the issues arising out of these events in one section, III,F, below. The two items discussed in this section can be separated from the overall treatment of employees on the aerosol line.

[36] The Union was certified on August 12, 1991, and stewards had been elected or appointed.

charge because the employee was a known union sympathizer.

Betty Bates, after some adventures which will be recounted below, was back working on the aerosol line in November 1991. She was the last of the 10 employees named as in-plant organizers in letters from Jim Newport to the Company in March and April. Every one except Bates was gone by this time.

Bates did not remember the exact dates in November, but she said that on Fridays before the weekends Burnside, ''always'' said to her that over the weekend he suggested she buy the Cincinnati Enquirer and find herself another job because ''you're just not going to make it around here.''

Burnside did not recall whether Bates was working in the aerosol room in November, but denied he ever told her to look for want ads in the newspaper.

I credit Bates in this instance. Burnside is not very reliable on what he might have said to Bates in November, if he did not know whether she was working for him at that time. As far as Bates is concerned, I have tried to lay out my views on her credibility above, in section III,B,2,d. I found her credible then, and I find her credible now. I find that Burnside's remarks were threatening and coercive and violated Section 8(a)(1) of the Act.

C. *Loyalty and False Statements*

1. Discipline of Geraldine Broadus

Paragraph 5(g)(i) of the complaint, as amended at the hearing, alleges that Respondent has had, since March 1, 1991, a rule prohibiting employees from making false or malicious statements about the Company, a company product, or an employee. Paragraph 5(g)(iii) alleges that enforcement of that rule since May 22, 1991, was intended to discourage employees from union activities or other protected concerted activities.

Geraldine Broadus went to work for Talsol in August 1990. She worked in the aerosol room for about 7 months, then transferred out to the hardening line and towel strip. She returned to the aerosol line in May 1991, working on the beginning of the line, putting valve stems in, and on the end of the line, putting finished cans in cartons. Vicky (last name unknown to the witness) was putting value stems in the cans at one end, and Pam McNew was working the other end of the line, putting cans in cartons. On May 22 Broadus said she noticed that the line was running ''really fast.'' McNew became ill and was replaced by an employee named Michelle. Broadus continued working back and forth from the beginning to the end of the line. She noticed that the line was running slower than it had been when McNew was working.

About the time that Michelle took Pam McNew's place on the line, Blizzard came to Broadus and asked her if she was ready to learn the job of putting cans in boxes. Broadus told him, ''yes, at that speed.'' Blizzard, as was his habit, reacted defensively. He asked Broadus, ''Are you trying to say the line is moving slower now?'' She said it was and he asked how she could tell. She told him that she could tell by looking at the line.

Blizzard then took Broadus over to the beginning of the line and asked Charles (Bailey), the mechanic, Debbie, the quality control person, and Pete Burnside, if the line had slowed down. They all said no. Blizzard then told Burnside that Broadus would have to be disciplined.

At the end of the day Broadus was called into Burnside's office. He read from a disciplinary report that Blizzard had said she was spreading ''malicious lies'' about the Company in violation of company rules (group 2, number 14). This rule provides for counseling or, depending on circumstances and an employee's prior record, more serious disciplinary action, up to and including discharge, for a number of offenses including number 14, ''making or publishing of deliberately false or misleading statements about the Company, a Company product or an employee.'' She was suspended for 3 days.

Subsequently, Broadus, or someone acting in her behalf, filed a complaint of some kind with OSHA which was then conducting an investigation of company safety practices. As a result, a settlement was reached by OSHA and the Company, the suspension was removed from her file, and she received backpay for the days she was off.

There does not appear to be any disagreement that the rule is a permissible exercise of management authority. Any employer has a right to maintain plant discipline and to bar inflammatory material from its premises, *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953); *Maryland Drydock Co. v. NLRB*, 183 F.2d 538 (4th Cir. 1950).

Further, the facts here show that Broadus had not participated in any union activity. There is no evidence that the Respondent knew or suspected she had participated in union activities. In response to a question on cross-examination Broadus admitted that she was not acting in concert with other employees, or for the benefit of other employees.

Well, why did Blizzard get so excited about what appears to be an innocuous opinion, casually stated in response to Blizzard's question as to whether Broadus could handle the job of taking cans off the end of the line and packing them in boxes? There does not appear to be anything malicious about the statement. If Broadus was mistaken about the line speed, her comment was not deliberatly false.[37]

It seems to me that Blizzard overreacted here, as he did in so many other instances, and I think it can properly be inferred that the target of his overreaction was not primarily Broadus, who saw what was happening, but, more importantly, to try to head off *any* speculation about the speed of the line and to discourage *any* employee from making *any* comments, public or private, about variations in line speed.

Therefore, I conclude that Blizzard's order of a warning and suspension against Broadus was really designed as a warning against any union activity or protected, concerted activity arising out of Respondent's manipulation of the speed of the aerosol line, and constituted a violation of Section 8(a)(1).

[37] In fact, based on my findings, below, that the Company did manipulate the speed of the line, I believe that Broadus, who, after all, had over 7 months of experience working on this same line from August 1990 to April 1991, could estimate the relative speed of the line by her experienced observation.

2. Discharge of Teresa Greene

The complaint alleges in paragraph 7(r) that Teresa Greene was discharged on April 26 because of her protected concerted activities.

Teresa Greene was hired in September 1990 as a salaried quality control technician. She worked in the laboratory under Teresa Case, a chemist, who also acted as the Company's safety director. Greene's functions involved the testing of batches of paint made by the Company's paintmakers.

In her work in the laboratory, she was in a position to hear conversations between people who came into the laboratory, Teresa Case, of course, and also Blizzard, and the supervisors, Zimmerman and Parsons. I do not doubt that some of these conversations concerned paintmakers, and possibly other employees, and I am sure that these conversations which she could overhear concerned personnel matters. At one point during the union campaign Greene testified that Zimmerman and Parsons were discussing a management meeting which they had just come from, and she recalled that Zimmerman commented to Parsons that ''now they want us to press down on the people and write them up whenever we can.'' Parsons replied, ''Yeah, it's just something we got to do.''

Blizzard admitted that Greene was in a position to hear conversations about personnel matters but he said that he believed she was part of management, and that he had told her he expected her to keep these conversations confidential.[38] Blizzard also said that she shouldn't take news of personnel matters she had heard in the lab to employees.[39]

Greene made friends with the paintmakers, whose work she checked, and with whom she must have had numerous contacts during the workday. In late February or early March, Greene was planning to go out after work for a drink with paintmakers Rick Ward, Dan Reed, Curtis Compton, and another employee identified only as ''Pam.'' Teresa Case asked Greene if she was going. Greene asked Case if she was going and asked her if she wanted to join them. Case replied that it was not a good idea, that it showed a lack of ''leadership ability'' to associate with hourly paid employees and that it could jeopardize future raises or her job. Greene said that what she did after 5 o'clock was her own business.

Rick Ward was fired about March 20 for excessive absenteeism. He had earned nine points in the Company's absenteeism calender. Greene stated that she began dating Ward after that, and Ward would come by to pick her up or drop her off at the plant. At one point Zimmerman commented to her that they had seen Ward dropping her off. Then a couple of days later, she received a copy of a memorandum addressed to ''all hourly employees'' that no former employees were to be on company property; there was to be no dropping employees off on the property; this had to be done on the street.

During April, Greene checked a batch of paint made by Dan Reed and noted that it was ''off'' in its color. The remedy for this error was to double the batch using the correct amount of color. Greene asked Case what she should do, and Case told her that she should take care of it with Reed.

Before Greene went out to the plant with instructions for Reed, Zimmerman came into the lab. He asked if Reed had ''messed up'' the batch on purpose. Greene said no, it could easily have happened because of the proportions in the mixture. Zimmerman then said if Reed had done it on purpose he would write him up. Greene then went out and told Reed to be more careful ''because they're looking to write you up.''

About 2 weeks later, on April 26, Reed was resigning and Greene was summoned to Blizzard's office. Teresa Case was also there. According to Greene, Blizzard asked her what she had said to Reed. Greene said she told him to be more careful. Blizzard then said that he could no longer trust her and that he was going to write her up and give her a 3-day suspension.

Later that day Greene was called back to Blizzard's office, where Teresa Case was also present, and Blizzard told Greene that he was going to fire her. She was a company employee and should be for the Company and not for the plant people. He couldn't trust her and she ''probably singlehandedly made the Union election go for the Union.'' Greene asked Blizzard how he had found out about all this and he told her that Reed had filed some kind of a discrimination suit against Jim Zimmerman for the incident.[40]

Blizzard denied that the Union had anything to do with the discharge of Greene, and he denied he mentioned anything about her causing the Union to win the election.

The record here shows that Greene was a rank-and-file employee. Even though she was salaried and not a member of the bargaining unit I have found to be appropriate here, she possessed none of the indicia of management or supervisory employees and none of the indicia of a confidential employee. She was not part of the personnel department and had no functions which confidential employees commonly share, such as maintenance of records or participation in disciplinary or evaluation procedures. Thus, unless there were particular circumstances in her position as a lab technician which would require her to keep certain information such as trade secrets, formulas, or personnel matters secret, there would be no reason why she should not have alerted Dan Reed to be careful in his work. There appear to be no such special circumstances. Case's warnings, whether they came before or after the advent of the Union, seem to be more of an implied imposition of a military-style no-fraternization ban between officers and enlisted personnel, an elitist view of the relationship between staff employees in the office and line employees in the plant. There was nothing in that warning to establish no-talking, as opposed to no-fraternization barriers.

[38] I do not believe this assertion, given in response to a leading question, is entitled to much weight. There was no indication of when, or where, or under what circumstances the statement was made, if it was made at all. There is no evidence that Greene was anything more than a laboratory technician.

[39] The conclusion in Respondent's brief that Greene ''knew that the Company considered her part of management'' is not borne out by the record here. Nor does the record indicate that she was either a managerial or a confidential employee, *PTI Communications*, 308 NLRB 918 (1992).

[40] See sec. III,B,2,b, above. The day Greene was fired was the same day Blizzard had a verbal row with Curtis Compton over some connection Compton had with Reed and a complaint by Reed about some relationship between Zimmerman and Teresa Case. Since neither Reed nor Case testified we will never know the details of this complex and mysterious set of events.

Similarly, Blizzard's rote responses to leading questions give no indication that Greene may have had explained to her, either on hire or during training or at any other time during her tenure, that the Company had any feelings at all that she should have kept her knowledge of conversations or decisions confidential.[41]

In the absence of probative and credible evidence that Greene was made aware that talk in the lab was confidential, Blizzard, Zimmerman, Parsons, or Case have only themselves to blame if they talked indiscreetly in the lab where Greene could hear them, and Greene then reported what they said about people in the plant to those people.

I found Greene to be a candid and credible witness. She was straightforward with Blizzard as he testified that she was. She did not think she had done anything wrong. If anything, an admonition to a paintmaker to be more careful in his formulation of paint would seem to be helpful rather than harmful to the Company. If she told Reed that the Company was looking to write him up, then Zimmerman and Parsons should not have aired their instructions from management openly in the lab.

Having found that Greene was not a confidential employee, *PTI Communications*, supra, and that she was under no policy or directive from the Company to restrict her talking about things she heard in the lab, I now have to answer the question of whether her discharge, unfair as it may have been, was a violation of the Act.

The answer to this lies in Blizzard's outburst at the discharge meeting on April 26. Reed's resignation sent a shock wave through management. I have noted Blizzard's frenzied encounter with Curtis Compton on the same day, after a meeting with Reed and Terry Merrill. I do not know whether the latter meeting took place after the morning session between Blizzard, Case, and Greene and their afternoon session, but I do know from the Compton situation that Blizzard was very disturbed, blaming Compton and, later, Greene, for Reed's resignation. In considering all of Blizzard's testimony, I know how deeply he felt about this union situation, and I find it completely logical that he would couple Greene's activity with the Union's election campaign. I find that he fired Greene for her activity, as he considered it, in favor of the Union, and I find that the discharge violated Section 8(a)(1) and (3) of the Act.

D. *Some Discharges*

1. Ernest Fultz

The complaint alleges in paragraph 7(d) that the Respondent discharged Ernest Fultz because he joined or assisted the Union and engaged in protected concerted activities.

As I have already found in section III,B,4,a, above, Ernest V.C. Fultz had been rehired by Talsol in late January 1991. He was employed there from September 1990 through early January 1991, during which period he acquired three attendance points. I have also found that Fultz engaged in union activity, attending meetings, signing a union authorization card, and handing out cards to other employees. I have also found that in March, Jim Zimmerman threatened Fultz with loss of his job if he became involved with the Union.

In another complaint allegation, I did not find a violation of law in a conversation between Fultz and Zimmerman on April 15, but I do find, now, that Fultz' remarks in that conversation: ''at least the Union doesn't lie to us'' during a discussion of Company literature; and Fultz' response to Zimmerman's question of whether Fultz was paid by the Company or the Union, that the Company did, ''but just barely'' gave Zimmerman a clear indication that Fultz' sympathies lay with the Union and not the Company.

Reinforcing the evidence that the Company was aware of Fultz' union activity is a report by Betty Bates of a conversation she had with Dave Blizzard, significantly, occurring before Bates' name was included in a list of in-plant union supporters on April 15. In this conversation Blizzard told Bates that the Union was going nowhere, and that the only people he believed who were active in manufacturing were Compton, Fultz, and Brewer. He went on to say that all three of these had problems with the point system and would probably be ''gone on points before it gets off the ground, and Fultz, he's kind of crazy, nobody pays him any attention, anyway.[42] I find that Fultz did engage in union activity and that Blizzard not only knew about it, but was assuming that Fultz would remove himself as a union supporter in the Company by accumulating enough points to warrant discharge under company rules.

In fact, Fultz did accumulate seven points (three from his prior time at the Company, and four more from the end of January to mid-April), a circumstance which triggered an automatic disciplinary warning from management that if he got two more points he would be discharged. Zimmerman prepared the warning and handed it to Fultz on April 17. At the same time Zimmerman sent a copy of the warning to Blizzard in accordance with company practice.

Fultz was, at this time, still a probationary employee, according to Blizzard. Fultz had served a probationary period in his first period with the Company, but he had to serve another in the second employment. Blizzard noted Fultz' seven points and the fact that he was a probationary employee. He called Zimmerman in and asked him if there were any problems with Fultz. Zimmerman said there were, Fultz was interfering with the paintmakers.[43] So Blizzard and Zimmerman decided to ''use our prerogative'' to discharge him.

Zimmerman testified that he had problems with Fultz conversing with other employees and keeping the paintmakers from their work. Zimmerman said Fultz was not performing his own job. He had talked to Fultz about this, telling him to do his job and leave other people alone, or he would discipline him. Both Blizzard and Zimmerman denied that they knew of Fultz' union activity or that union activity had anything to do with his discharge.

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[41] Teresa Case, who could have answered these questions, was not called as a witness.

[42] Blizzard denied that this conversation took place. He pointed out that he didn't talk to Bates during this union campaign because she had been a ''snitch'' for the Company last time and he was afraid to say anything to her. I note that I have found that he did talk to her on at least one occasion about the Union and I note, further, that Bates placed the conversation about Fultz at a time before the Company was notified that she was working for the Union. I do not credit Blizzard's denial that the Fultz remark was made.

[43] Fultz' job included cleaning around the area where paintmakers were working. He knew the paintmakers because he had been a trainee paintmaker in his first tour of duty at Talsol.

Fultz testified that he had received no complaints from Zimmerman and no unfavorable comments about his work. But, on cross-examination Fultz did admit that Zimmerman angrily told him not to attempt to work with the paintmakers and also threatened to fire Fultz if he saw him talking to the paintmakers again. There is, however, no evidence that Zimmerman ever observed Fultz, after that warning, talking to paintmakers.

I have found, based on Fultz' conversations with Zimmerman, and on Blizzard's admissions to Betty Bates, that the Company was aware of Fultz' union sympathies. Fultz' union activities are undenied. Given the strong expressions of hostility to the Union and the numerous findings of threats and coercion which I have found, I find that the General Counsel has established a prima facie case that Fultz' discharge was made in retaliation for his union sympathies and activities under the Board's *Wright Line* doctrine.[44]

Respondent's defense to this allegation depends in part on an argument that Fultz was not a credible witness. I had some problems with that, but I find that he was credible even though, as with many witnesses here, there are minor discrepancies between what they said in their affidavits, and their testimony at the hearing. I have generally resolved these discrepancies in favor of my impressions of the witnesses as they testified. This has led to my crediting of Fultz based on his demeanor on the witness stand. I have considerable doubt about Blizzard and Zimmerman.

In this case, Fultz' attendance was not good. In line with company procedure he was warned that two more absences would result in his discharge. Beyond that, there is the question of Fultz' work performance. He had worked as a helper or trainee to the paintmakers before and Blizzard apparently had no problems with his work when he rehired him. Fultz assumed, maybe mistakenly, that he was being rehired in that same job. He was disabused of that idea when Zimmerman ordered him to stop helping the paintmakers. But I find it difficult to understand how Zimmerman could reasonably expect Fultz to do cleanup and janitorial work around the paintmakers' work area without being allowed to speak with them. The order not to talk could more logically have arisen out of the Respondent's policy, as expressed to Compton, Brewer, Bates, and others, to prevent talking between known union adherents and other employees.

If the seven points, in themselves, would not have warranted discharge,[45] then the talking to other employees must have been the deciding reason. Since I have found the Company's rules on talking between employees were imposed during the union campaign to discourage union activity, I find that that reason, in itself is discriminating, and the discharge of Fultz based on that reason is discriminatory and a violation of Section 8(a)(1) and (3) of the Act.[46]

[44] *Wright Line*, 251 NLRB 1083 (1980), affd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), affd. in principle *NLRB v. Transportation Management Corp*., 462 U.S. 383 (1983).

[45] There would have been very little logic in issuing a warning if Fultz was going to be discharged for having accumulated the seven points.

[46] Respondent may have broad discretion to discharge a probationary employee for any reason, or no reason, but not for a discriminatory reason.

2. Curtis Compton[47]

The complaint alleges in paragraphs 7(i) and (j) that the Respondent transferred Compton to the warehouse on June 10 and on June 25 reduced his pay and caused his termination.

Compton was hired as a paintmaker on August 20, 1990. According to his testimony he was given little training. Once when he had a problem he asked Dave Blizzard what to do, Blizzard curtly informed him to see one of the other paintmakers and not to bother him. Toward the end of October, Compton was mixing a batch of hardener and apparently did something wrong, because the mixture turned hard and waxy. He went to two other paintmakers, Louis Clough and Dan Reed, and they managed to fix it, but Blizzard found out about it and gave Compton a 3-day suspension.

After that Compton served out his probationary period and received a raise. In March 1991, he became active in the Union, and was identified as an in-plant organizer on the first letter from Jim Newport to Terry Merrill dated March 25. I have recounted, above, the anger that Blizzard displayed toward Compton and the encounters between them on April 26 and 29. Despite Blizzard's allegations about Compton's taking more than 2 hours to do a 45-minute job, and being a ''lazy bum,'' there are no disciplinary warnings in Compton's file after the November 1990 suspension.[48]

Compton acted as the Union's observer at the election held on May 10.

On June 10 Jim Zimmerman and Chris Dixon called Compton in to the office and told him he was being reassigned to the warehouse, a few minutes walk around the corner on State Route 747. They told him they needed help in locating and putting materials in an orderly fashion, as in a regular warehouse. His pay would remain the same. Compton agreed—and no other reason for the move was mentioned. On June 17 Dixon, who was in charge of the warehouse told Compton that he would be there permanently, at least until they got the warehouse in order. His wages would remain the same.

Then, on June 25, Dixon and Larry Parsons came to Compton who was working on a towmotor. They took him back to the main warehouse area and Dixon read from a sheet of paper that Compton's wages had been cut $2 per hour because that was warehouseman's rate, that he had messed up some batches of paint and that they had put him in the warehouse until they figured out what they could do with him.

Compton said this wasn't right, that he hadn't messed up any paint. Compton and Dixon discussed whether or not the Company could do that, Parsons said nothing, and Compton walked away. About 15 or 20 minutes later Compton again discussed this matter with Dixon. Parsons had left by that time. Dixon merely said that he did what he was told to do. Compton again complained that it was unfair, that he couldn't work for $6 an hour, and finally, announced that he quit and that he would ''see them in Court.'' He left at 10:09 a.m.

[47] See, above, sec. III,B,2,b and c.

[48] Compton testified that he discussed his paintmaking abilities with Zimmerman several times, the latest in May and that Zimmerman had told him there were no problems with his abilities as a paintmaker.

About 3 p.m. that day Compton had some second thoughts about quitting and he called Dixon, telling him that he had been upset, but he had a change of heart and would like to come back. He had been upset and he'd like to come back to work. Dixon said that he couldn't tell him yes or no, but he had to check with management and for Compton to get in touch the next day. Dixon did say that they had not replaced him yet.

The next day, June 26, Compton arrived at the warehouse about 7 o'clock. Dixon got there soon after and had a young man in his truck. Compton asked if he could go back to work, and Dixon said no, they had already replaced him.

Under date of June 26, Dixon wrote to Compton ''confirming our conversation on Tuesday, June 25, 1991, you have quit your position and your quit is accepted.'' Compton, in turn, wrote a letter to Dixon dated June 28 outlining the facts as listed above, his quitting, his call back that afternoon and his reporting to work on June 26. Concluding, Compton stated that since the Company refused to take him back on June 26, he considered himself fired, but he remained ready to return to work at the Company's convenience.

This letter brought an answer from Terry Merrill dated July 1. Merrill recapitulated Compton's actions on June 25, including Compton's farewell, that he would see them in court. Merrill then stated, ''Mr. Compton, no coercion or threats were made to you; you simply quit, clocked out, and left Talsol's premises. Mr. Compton, your position has been filled and all of us at Talsol wish you well in all future endeavors.''[49]

Aside from the question of whether Compton just quit, or whether his resignation was the result of a constructive discharge caused by company action, which will be discussed later in this section, the critical issue is whether Compton's work as a paintmaker was so deficient as to render him unfit to continue in that position.

Dave Blizzard testified that he was responsible for moving Compton out of paint making in June 1991. Blizzard become involved when the Company received complaints from customers about company products not drying according to specification.

The products involved were a clear coat sold with the trade name of ''Glow,'' and a companion product ''U-2 Hardener.'' These products are used primarily by auto body shops to paint automobiles. After the surface to be painted is cleaned and primed, equal parts of Glow and U-2 are mixed together and applied to the car. This treatment is designed to supply a deep gloss, and resistance to the sun, to chemicals of various kinds and to gasoline, insects, or bird droppings. Glow contains a product referred to as ''tin''[50] accelerator or catalyst which is designed to work with the U-2 hardener to dry like a baked-on product, to a hard, clean finish.

Glow is made in batches of 300 gallons, using what Blizzard described as 100 percent tin catalyst. U-2 is made in batches of about 165 gallons. Both these products are made by paintmakers. The paintmakers receive a formula[51] from a supervisor, together with any verbal instructions necessary. The formula is printed on a paper called a ''batch ticket'' prepared by computer. The ticket contains a list of different chemical substances and quantities of the substances to be used in preparing the mixture.[52] The computer also prints beside the names of each material a notation if the supplies of product need to be checked, or held, or are in order.[53] When the batch ticket is given to the paintmaker there is a series of numbers, one to the left of each substance, showing the paintmaker the exact order for adding that substance to the mix.

Each batch ticket is imprinted with a batch number in the upper righthand corner. There is also a date code using the total number of days in the year for the first three figures and the last numeral of the current calendar year for the fourth number. For example, a batch made on October 28, 1990 (R. Exh., p. 4) would have a handwritten number 2710 standing for the 271st day of the year 1990.[54] The paintmaker's name is also written on the upper right-hand corner and the date the batch was made, in uncoded numbers, such as ''9-28-90.''

The Company also uses what is called a shipping code or packaging date code, which is placed on the outside of each container of paint shipped out of the plant.

When the batch is completed, the paintmaker takes a sample of the batch as prepared to the laboratory. The sample is tested and, if approved, it is retained in the lab. The batch ticket is kept in a book in the foreman's office next to the lab.

On May 30, 1991, the Company received a complaint from a customer in Florida, a wholesaler of Talsol's products. The complaint alleged that two shops had complained that after using some of the Glow, U-2 mixture, the result was still tacky after 4 days, when it should have dried overnight. The batch numbers referred to in this complaint were the packaging numbers. According to Blizzard, they could back track from these packaging numbers to locate the original batch samples in the lab. Doing this, the manufacturing batch number for the Glow would be 451, manufactured on February 14, 1991, and for the U-2, 0661. Then they compared the drying qualities of the batch samples with standard samples maintained in the lab to see if they could see what the problem was. These tests indicted no problems either with the Glow or the hardener.

Two other complaints were received about this same time. One, undated, was introduced as two pages of illegible notes in Blizzard's handwriting, but was identified by Blizzard as being from a customer named Don Rocco in Boston complaining about hardening times in what Blizzard identified as batch No. 431 (manufacturing number) of Glow which would have been made on February 12, 1991. The second complaint

[49] In view of the fact that this case has become one of Compton's ''future endeavors,'' Merrill might like to revise his valediction.

[50] An abbreviation for diabutyltindilorate.

[51] The formulas are calculated by Blizzard, or by Tom Miller, described as a paint formulator.

[52] In preparing Glow there is a total of 12 ingredients in the mixture.

[53] Blizzard testified that these notations are unreliable, but they do not concern us here.

[54] Blizzard testified that this number, rather than the computer printed number, is the number the Company uses to identify the batches and the batch tickets. The computer code is used when reference to the computer in necessary.

came from a customer named Terry Bloomquist,[55] dated June 5, 1991, and merely advised Talsol that he had complaints on Glow and U-2, no specifics given. The batches were identified as 431 for the Glow (manufacturing number) and 3219 for the U-2. Batch 431 of Glow would have been made on February 12, 1991.

Facing these two new complaints, Blizzard tried to figure out what was going wrong. As he put it

> knowing the product, the only thing that, in the product that could slow down the curing time would be the shortage of catalyst. So I presumed probably the most likely way to be short of the catalyst was for someone to have made a mistake and used the 10 percent catalyst rather than the 100 percent catalyst in making the product.[56] I got the batch, I got the gallon out of stock and I poured a quart of it and I presumed that the quart had the 10 percent version of catalyst and doctored it till it would have been correct if it did have (the 100 percent) version.

After Blizzard ran this test on batch 431, he checked the batch ticket and determined that Compton had made the batch. He guessed, again, that Compton had probably added the 10 percent solution instead of the 100 percent. Based on this evidence, Blizzard composed a memo to Terry Merrill on June 6 requesting that Compton be reasigned to another job. He did not, however, limit his complaints against Compton to this bad batch of Glow. Rather he included a catalog of misdeeds, as follows:

> As you know, we are receiving complaints from customers on our Glow-U-2 system. As I pointed out to you, Curtis made mistakes on 6 batches of U-2. One was shipped before it was corrected and others were adjusted to spec before shipping. On one batch Curtis poured resin into a batch tank and spilled 4 gallons on the floor. This caused us to correct the batch for the second time.
>
> We are now testing the Glow that was made during the same time frame. Early indications show that some batches do not have enough tin accelerator. We are setting up a test program to test the last 9 batches of Glow. The complaints from the customer indicate that the trouble started with the last 4 batches that were made by Curtis.
>
> He has previously been suspended for making a bad batch and trying to correct it himself and hiding the mistake from management.
>
> We cannot afford the damage that he is causing in the Paint Manufacturing Department. We certainly do not need the customer complaints.
>
> I do not intend to allow him to make any more paint. Please find another job for him to do. I do not want him in the Paint Manufacturing Department.

Blizzard attempted to explain the reference to batches of U-2 in the first paragraph of this memo, and it appears from the memo that the matter was discussed with Merrill before the memo was written. This would indicate to me that they were proceeding very carefully with this touchy issue, or that they were using a paper trail to support the actions they were taking. In the memo, Blizzard stated that Compton committed mixing errors on six batches of U-2 at some unknown time but no discipline or reprimand was given to him. This does not jibe with Respondent's reactions to errors back in November 1990 when Compton was suspended for 3 days, and the problems arising out of the May and June 1991 complaints, which resulted in Compton's transfer out of the paint department. Blizzard's explanation of why Compton was not disciplined was hesitant and unconvincing, ''other than the unreliability of it, it wasn't, it didn't seriously hurt the product. It cost us time, it cost us money, but, as far as damaging the product greatly, it did not.'' Despite this, these incidents were brought out in the lead paragraph of Blizzard's memo to Merrill of June 6, and constituted a part of Blizzard's rationale for moving Compton out of paintmaking.

After writing this memo, Blizzard continued his investigation into Compton's work, examining the last nine batches of Glow which had been made. He said that he used the same test he had with the 431 batch, described above, but he did not bring the tin accelerator content up to 100 percent. He left the samples as they had been made, then observed the drying times. This revealed, according to Blizzard, that four batches were slow drying. The conclusion was that the last four batches made failed the test, and they were all made by Compton.

Blizzard then wrote another memorandum to Merrill, dated June 13, outlining the results of these tests. I note that, while he described four batches made by Compton as ''clearly deficient,'' he listed five different batch numbers[57] under the heading of ''bad batches,'' manufacturing numbers 421 (Feb. 11), 431 (Feb. 12), 441 (Feb. 13), 491 (Feb. 18), and 911 (Apr. 2).

The batch tickets submitted in evidence show batch 1990 (Oct. 5, 1990, R. Exh. 24, pp. 1 and 2); batch 2710 (Oct. 28, 1990, R. Exh. 24, p. 3); batch 3050 (Nov. 1, 1990, R. Exh. 24, p. 5);[58] batch 3330 (Nov. 29, 1990, R. Exh. 24, p. 7); batch 431 (Feb. 12, 1991, R. Exh. 29); batch 241 (Jan. 24, 1991, R. Exh. 32, p. 1); batch 451 (Feb. 14, 1991, R. Exh. 32, p. 2); and batch 771 (Mar. 18, 1991, R. Exh. 32, p. 3).

The first four numbers are for batches made in 1990, which do not concern us at this point. The other four batches found wanting are 241, made by Compton on January 24, 1991 (R. Exh. 32, p. 1); 431, made by Compton on February 12 (R. Exh. 29); 451, made by Compton on February 14 (R. Exh. 32, p. 2); and 771, made by Compton March 18, 1991 (R. Exh. 32, p. 3).

I think that the General Counsel has established a prima facie case for a violation of law in Compton's transfer on

[55] His area code is shown on the complaint as 319 which is in eastern Iowa.

[56] This was, as Blizzard admitted, an ''educated guess.'' There were two versions of the tin catalyst, one, the 100 percent tin, was used for Glow, and the other, a 10 percent tin, for other products.

[57] Which really refer to four separate batches. Part of the problem here is that Blizzard shifted from using manufacturing numbers to using packaging numbers to refer to the batches he was talking or writing about. For example, after referring to manufacturing batch numbers to show how he made his tests, Blizzard switched to packaging batch numbers in his note to Merrill on June 13.

[58] This was the batch that caused Compton's suspension.

June 10, 1991, based on Blizzard's demonstrated and repeated expressions of hostility toward the Union in general, and Compton in particular, one of the first two in-plant organizers made known to Respondent, and the attempted quarantine of Compton during and after the union campaign.[59]

The question, now, is whether the Respondent had valid business reasons to effect the transfer of Compton out of the paint manufacturing department.

The Respondent's response to this, arguing that Compton made serious mistakes as a paintmaker, if it is borne out by credible evidence, would certainly justify a reassignment from paintmaker duties, despite the background of hostility and discriminatory treatment.

Looking first at the complaints which started the whole process of testing and questioning of Compton's work as paintmaker, it appears that the first complaint, from Florida Wholesale Distributors, was not legitimate. It was checked by Tom Miller, a paint formulator, and is fairly detailed on the problem presented. This complaint was checked out, the batch complained of was checked out by Miller, or at least by someone other than Blizzard. The batch was found to be satisfactory, and the complaint was held to be not valid.[60] In a note on the face of the complaint (R. Exh. 25), Tom Miller wrote that the customer was not satisfied with the results of Talsol's tests, and said he would contact Terry Merrill. There is nothing further in the record about that development, we don't know whether the customer contacted Merrill, or what happened if he did.

The next complaints came in from a customer named Rocco in Boston. The notes allegedly taken by Blizzard on this one are completely illegible, and furnish no information on the date, the nature of the complaint, or what was done about it (R. Exh. 26). We are left with Blizzard's testimony. The third complaint came in on a fax dated June 5, 1991, from Terry Bloomquist indicting only that he had received complaints from his customers on certain products.

On these complaints, Blizzard determined to check the paint batches himself, with the results I have outlined above. He did not, so far as I can gather from his testimony, discuss with or work with Miller, who had performed the first tests, or with the quality control person in the lab. He presented no records of his tests, and the only written record of what he did is in his two notes to Merrill.

Merrill testified that he received ''many, many complaints,'' mentioning the specific complaints from ''Florida Wholesale, Bloomquist from St. Louis and Big Dominic Rocco out of Philadelphia.''[61] Merrill then went on to say he ''received another 20 or 30 phone calls from all over the country.'' This last statement did not go any further. Counsel led Merrill away from any complaints other than the three we have been talking about, and there is no mention anywhere else in the record of any other complaints. This is significant, because if Blizzard's analyses of the samples of the 4 ''bad batches'' were correct, there would have been more than 20 or 30 complaints from all over the country and, most certainly, more than 3 complaints. Blizzard's note to Merrill, dated June 13, shows a total of 1,184 gallons of paint produced in those 4 bad batches, 1,076 gallons of this had been sold, and, according to Blizzard's June 13 note, 108 gallons were rectified and returned to inventory.

I have already noted the serious problems I have with credibility both with Merrill and Blizzard. I have doubts about any unsupported statement by either of them made about critical issues in this case when those statements are unsupported by physical or undocumentary evidence, or uncorroborated by other testimony of more credible witnesses. Here the entire weight of Respondent's defense to the General Counsel's prima facie case depends on Blizzard's unsupported claim that he found serious defects in four batches of Glow made by Compton between January 24 and March 18, 1991 (R. Exh. 28). Tom Miller, who worked on the first complaint, dealing with batch 431 was not called on to testify. Teresa Greene, whose initials appeared as approving all of these batches, was fired by Blizzard on April 24, but her successor was not called on to testify about Blizzard's alleged changes in testing procedures. There is no record at all of what happened to the 3 complaints which started the whole thing off, or of the 20 or 30 other ''complaints'' from all over the country about defective Glow paint. There is nothing on any of the batch tickets, or any document, other than those prepared by Blizzard to justify his analysis of the paint batches, to show that there were bad batches made, and what was done about it internally with quality control or externally with customers, among whom 1,076 gallons of flawed Glow clear coat could have caused an awful lot of problems.

All of this convinces me that Blizzard's testimony, and the exhibits offered and received to show Compton's incompetence, was a show designed solely to justify a continuation of the discriminatory treatment meted out to Compton, and to provoke him to quit, as he did, later. I find that by transferring Compton out of the paintmaking department and into the warehouse Respondent has violated Section 8(a)(1) and (3) of the Act.

Having moved Compton over to the warehouse, the next step was to reduce his wages. This was done on June 25. There is no dispute that it was done, but there are no business reasons shown, other than the testimony of Merrill and Blizzard, that $6 was warehouseman's rate of pay, and since this was done to a person whose transfer out of the paintmaking department I have found to be violation of Section 8(a)(1) and (3), I find that the lowering of his wage rate from $8 to $6 was a further violation of Section 8(a)(1) and (3) of the Act.

I find further that under Board precedent Respondent intended to and did create such a negative atmosphere and intolerable working conditions for Compton that it constructively discharged him in violation of Section 8(a)(1) and (3) of the Act. *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976); *T. & W. Fashions*, 291 NLRB 137 (1988).

3. Darryl Denham

The complaint alleges in paragraphs 6(c), (d), and (e) that Darryl Denham engaged in protected concerted activity by complaining about working conditions at Talsol, and that he was discharged because of this.

[59] See *Wright Line*, 251 NLRB 1083 (1980).

[60] Merrill stated that 95 percent of all the hundreds of complaints received were not due to Talsol's mistakes, but improper use by customers.

[61] Note that Blizzard described Rocco as being from ''the Boston area'' and my own observation of Bloomquist's telephone number on his complaint as being from eastern Iowa.

Denham was hired on September 16, 1991. He had read an advertisement in a newspaper, responded, and filled out an application. He was interviewed by Larry Parsons late in August. During this interview Parsons told Denham that the Union had been voted in, by just one vote, and that the Company's president had taken it personally. The president was ''a little unhappy'' that the employees went union after being treated so well over the years.

About 2 weeks later Denham was called in for another interview with Parsons. Later, Parsons called Denham to tell him he was hired, and he reported on September 16 as a shipping clerk. He was given training on using forklifts and ladders and on retrieving merchandise.

When he started work, Denham took note of an ''OSHA report'' posted over the timeclock. He was concerned and asked several other shipping department employees about the OSHA report, how safe the plant was, and what he should look out for. He expressed his concerns about safety to other employees, the way things were stored and placed on shelves, which were almost impossible to reach. Denham also expressed his opinion that the equipment used to retrieve those items was not safe. He discussed these things with other shipping department employees, but he did not know if Parsons knew about these discussions.

On September 24, Parsons told Denham that there would be a safety meeting that day. The meeting was conducted by a woman, identified on cross-examination as Teresa Case, the Company's safety director and an admitted supervisor within the meaning of the Act. There was another, unidentified, woman present, and Tom Miller, the Company's paint formulator,[62] who was there to answer technical questions about materials on the premises.

The meeting opened with a slide show, and distribution of what Denham described as a ''cartoon magazine'' about safety. After this presentation was finished, Denham asked several questions. He had had experience with some of the chemicals used at Talsol on a previous job, and he took issue with company explanations concerning the health hazards of chemicals which he identified as Zylene, Zylow, and Telulene, an ''array of chemicals.'' Denham also asked about the OSHA report, and the company people said they disagreed with OSHA's findings, that they were disputing those findings, and that Talsol provided a safe workplace. Denham kept it up, questioning the type of training in handling and storage of merchandise, and the lack of posted fire evacuation plans. Denham described Case as very pleasant at the start of the meeting, but becoming irritated, and then visibly angrier as he continued to question her and the company explanations. No other employees said anything during the meeting. None of them were identified. The meeting ended without further comment or incident, and the employees returned to work.

The next day, September 26, was described by Denham as a normal workday, but on September 27, Larry Parsons came up to him about 2 o'clock in the afternoon, told Denham he was leaving early because he had a cold, and said he would see him the next day.

Later that afternoon, about 20 minutes to 6, Denham was called into Jim Zimmerman's office. There, Zimmerman, who was alone, told Denham that his employment was terminated, to get his personal belongings, leave Talsol's property, and not come back. Denham asked him why, and Zimmerman ''angrily'' repeated that he was to get his things and leave. Denham persisted, saying that there had to be some reason. He asked this three or four times. Zimmerman at first replying that he didn't have to give him a reason, then, becoming very angry, telling Denham that it was a ''management decision.'' Denham then picked up his personal belongings, clocked out, and left.

The next day Denham called the plant and spoke to Parsons. Denham explained that he was surprised by his discharge; that, as far as he knew he was doing a satisfactory job and he had no indication from Parsons that he was doing otherwise. Parsons replied that it was a management decision; that he should just leave it alone and get on with his life. As usual, Denham persisted, saying that it was hard to tell his family that he was fired and didn't know why. Denham then indicated that he would have to go to the Labor Board. Parsons repeated that Denham should leave it alone and get on with his life.

Denham testified that in his 11 or so days with Talsol Parsons had told him, ''on a daily basis,'' that he was ''doing fine, good work.'' Denham had not been late or tardy in his short time there, and had never been warned about any deficiency in his work.

Larry Parsons denied that he ever told Denham that the company president had taken the election loss personally. Parsons described Denham as a slow worker. He said Denham was not as good on the towmotor as he had thought, and that he took corners too close, bumping into cases and racks at the corners. Parsons did say that he thought that Denham would work out of these bad habits.

Jim Zimmerman testified that he heard Denham giving orders to one of his employees, and that, as a result, he told Denham to take up any such matters with his own supervisor, Parsons. Then Zimmerman went to Blizzard with this complaint against Denham. Blizzard told Zimmerman to fire Denham. Since this was the day Parsons, who would ordinarily handle the discharge, had gone home sick, Zimmerman was deputized to tell Denham he was being fired. Since it was company policy not to inform probationary employees of the reasons for their discharges, Zimmerman did not tell Denham why he was being fired. Both Parsons and Zimmerman denied that the discharge had anything to do with Denham's complaints about safety, nor did Zimmerman admit he was aware of any such complaints.

There are, as noted in the General Counsel's brief, discrepancies between the statements of Blizzard, Zimmerman, and Parsons in the record. For one thing, there was no identification by these witnesses, or Denham, of the date when Denham allegedly tried to order Zimmerman's employees around, the immediate occasion for the discharge. The only clue we have is Zimmerman's statement that he went to Blizzard and complained about Denham a week or two before the latter was fired. Two weeks is not possible, because Denham worked only 9 days (if Saturday, September 23 is included) for the Company. If it was a week, then Blizzard's testimony that he talked to Parsons about Denham's work, after talking to Zimmerman, is logical as well as consistent with Parsons' testimony that he was consulted about Denham's work before the discharge.

[62] See Curtis Compton's discharge, sec. III,D,2, above.

The problem with this state of facts is why, if Blizzard talked to Zimmerman and Parsons about Denham's inadequacies some days before September 27, was the discharge delayed. The decision to discharge must have been made sometime on September 27. Indeed, it must have been some time after 2 o'clock in the afternoon. Zimmerman testified that he was directed by Blizzard to actually do the firing because Parsons had gone home sick.[63] Since Parsons was gone, Zimmerman had to perform this task alone, an exception to Respondent's usual practice of having at least two supervisors present in disciplinary matters.

This leads to another question, which is, why did Blizzard, after hearing the charges against Denham, wait until Parsons, Denham's supervisor, and as such, as we can see throughout this case, responsible for discipline and discharges of employees under his supervision, was gone, requiring Zimmerman, alone, without a witness, to do the firing.

This doesn't make much sense, particularly since the incidents allegedly giving rise to the decision to discharge are really petty matters. Zimmerman, on cross-examination, testified that Denham had told Zimmerman's driver[64] that there were pallets of stock he wanted moved so that he could get to some other stock behind it. This doesn't indicate to me that Denham was attempting to ''order'' people around or, certainly not in the words of a supervisor directing actions of an inferior. Yet Zimmerman said he was ''irritated,'' and did not give Denham any opportunity to explain what he was doing or what he wanted done. Zimmerman ''cut him off'' and ordered him back to his department.[65] Parsons' complaints about Denham also seen minor, slow working and some sharp cornering on a towmotor. It is also a concern that Parsons had never told Denham to speed up his work and slow down on his corners.

This discharge does not seem logical, even under this Company's draconian disciplinary procedures. The General Counsel argues that Denham's discussions with his fellow employees concerning safety, during his first few days of work, and his persistence in questioning Company Officials Case and Miller at the safety meeting on September 25 constituted protected concerted activities, and his discharge on September 27 was ordered in retaliation for his exercise of his Section 7 rights.

Reviewing Denham's testimony, while I can find that Denham's conversations with his fellow, unnamed, employees may have constituted concerted activity dealing with safety and other working conditions, there is no evidence that these conversations ever came to the attention of management.[66] The safety meeting is something different. There is no question that Denham made statements at that meeting indicating his concern with matters which affected not only himself but all other employees, most certainly protected, concerted, activity. See *Meyers I* and *II*, below. There is no question that Teresa Case was a supervisor within the meaning of the Act.[67] Therefore, her knowledge of Denham's statements is company knowledge. Her reaction to Denham's refusal to accept company explanations, and his allegations of physical peril from chemicals pronounced relatively safe by the Company, gave rise, as Denham pointed out, to increasing irritation and anger on Case's part.[68]

Blizzard testified on cross-examination that Case reported back to him on safety meetings and, responded affirmatively to a question which asked if Case would report employee complaints made at safety meetings back to him. This record justifies a finding, which I make, that Case reported to Blizzard that Denham had raised serious questions about the Company's safety program at the meeting, and persevered in his questioning to the point where she became angry. Blizzard, whom we have seen could become very angry himself when the Company's motives and practices were questioned,[69] would have been faced with a situation very similar to Broadus' comments about the speedup of the aerosol line (see sec. III,C,1, above). Moreover, Blizzard's anger over the recently completed OSHA investigation would, no doubt, be revived by the prospect of renewed complaints and investigations by OSHA. I think it is proper to infer that Blizzard's reaction to Denham's remarks about safety would be similar to as his reaction to Broadus' remarks about the aerosol line. That reaction was to order the suspension of one offending employee and the discharge of the other. I find here that Blizzard ordered the discharge of Darryl Denham because of his remarks at the safety meeting, which I have found to be concerted activity protected by Section 7 of the Act. I find that Denham's discharge violated Section 8(a)(1) of the Act.

4. Sue Brewer and Velvie Wood

a. *Discipline of Sue Brewer*

Paragraphs 7(a) and (b) of the complaint allege that Sue Brewer was first warned (7(a)) and then suspended (7(b)) on account of her activities on behalf of the Union.

Sue Brewer was an early union activist. Her name, along with that of Curtis Compton, appeared in the first letter from Jim Newport to Terry Merrill on March 25 alerting the Company to the identities of in-plant union organizers. She received a counseling warning on April 8 for using a company telephone without permission.

Respondent maintains that Brewer was an habitual violator of a company rule prohibiting personal phone calls unless a supervisor's permission is obtained.[70] There are no public phones on the premises, the nearest ones being at a store on the other side of a busy road 2 to 3 minutes away from the plant. Brewer testified that the company rule was in effect

[63] Blizzard testified that he did not remember who, if anyone, was told to effectuate the discharge.

[64] Zimmerman could not remember this person's name. He explained that he has temporary employees in and out of his crew, and he does not remember their names at all.

[65] That, it seems to me, is acting like a supervisor.

[66] See, e.g., *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*); *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*); *Amelio's*, 301 NLRB 182 (1991).

[67] Respondent's answer of January 22, 1992, to the sixth amended consolidated complaint, admits that she is a supervisor within the meaning of the Act. There is no indication in the record that she left Respondent's employ, or was unavailable to testify here.

[68] *Consumers Power Co.*, 282 NLRB 130 (1986).

[69] See the cases of Compton, Teresa Greene, and Geraldine Broadus, above.

[70] Company rules, referred to throughout this record, were entered as R. Exh. 1 and contain two general categories: group one offenses, involving serious misconduct and almost always resulting in discharge, and group two offenses, giving rise to counseling, or more severe discipline, up to and including discharge. Brewer's offense here is number 16 of the group two offenses.

before the union campaign early in 1991, but that she had permission from her supervisor, Larry Parsons, to use the company phone call to check on her children before 7:30 in the morning. Both Brewer and Betty Bates, who also testified on this point, stated that before April 1991, if there was no supervisor around to ask, they could use the company phones without express permission. On this occasion, on April 8, Brewer felt that she needed to check on a sick child at home. Parsons had gone to lunch and she could not find another supervisor. There were no lights illuminated on the phone she used, indicating that lines were not busy. So she used the phone, she said, for 5 minutes. Later that day she was called into the office where Larry Parsons and Jim Zimmerman gave her the warning.

The Company's version of this incident was given by Terry Merrill, Dave Blizzard, and Larry Parsons. Parsons said that the telephone policy before April 1991 was that employee use of company phones had to be in an emergency, and ''they always had to have the permission of the supervisor to use the phone.'' Parsons indicated that he had problems in the past with Brewer receiving calls from a boy friend. He stated that on the morning of April 8 he talked to Merrill who asked him if Brewer had permission to use the phone. Parsons said no. There was nothing further said about this conversation, and apparently nothing was done about it. Later, at noon, Blizzard said he had caught Brewer on the phone and asked Parsons if she had permission to use it. Parsons again said no, and proceeded to write her up because Blizzard said that being caught twice in one day ''definitely'' warranted discipline.

Blizzard testified that he saw Brewer on a company phone at 12:10 p.m. on April 8. He went to Parsons and asked him to discipline her for that. Blizzard said that he had also talked to Merrill, who had seen Brewer using a phone earlier in the day. Blizzard also said that Parsons had given Brewer two verbal warnings for making and receiving calls.

Merrill testified that on the morning of April 8 he saw Brewer on the phone in building A. He asked her what she was doing and she said she was talking to building B about components. Merrill didn't believe her and he walked over to building B, where there was no one on the phone. He went back to building A and saw Brewer still talking on the phone. Merrill then said that he called Larry Parsons and said, ''Larry, this lady's back on the phone again.'' He said that he had heard of earlier problems with her on the telephone ''many, many times,'' because of calls from a boy friend, and a child. With all this, Merrill did not say that he was directly involved in the disciplinary action of April 8, saying only that he was ''indirectly'' involved in it. There was no explanation of what ''indirectly involved'' might signify.

On the basis of all this, I find that Brewer did make a call around noon on April 8, and that she looked for Parsons and couldn't find him, but she had a sick child and needed to check on him. Blizzard saw her on the telephone and asked Parsons if she had permission. When Parsons answered in the negative, Blizzard told him to issue the warning. I do not believe Merrill at all. His story was not corroborated by anyone. Parsons did not say that Merrill had called him. If Merrill in fact had called Parsons that morning, why wouldn't the discipline have been effected then? Further, Merrill's usual exaggeration about the ''many, many'' reports of Brewer's abuse of the telephones makes his whole story seem a similar exaggeration.

I think, that the discipline imposed, as may be seen from Blizzard's notes on the warning form (G.C. Exh. 23) was imposed as much because of calls into the plant, which Brewer could not be responsible for, as for the April 8 incident itself. Moreover, I credit the testimony of Brewer and Betty Bates that the policy before April was to allow the calls to be made when supervisory permission could not be obtained. This, I find, was a change in policy, and, in view of my findings here on the hostility of management, particularly Blizzard's, is attributable in this case to Brewer's identification with the Union and the election campaign. I find that this warning violated Section 8(a)(1) of the Act.

A second incident occurred on April 14. Brewer testified that after she arrived at work that day, her menstrual period started. She needed a tampon but didn't have one.[71] She asked the women in her work area, but none of them had any tampons. Brewer then went over to building A where Teresa Kee and Tina Pendergrass were working. Larry Parsons was there also, talking on the telephone. Brewer whispered to Kee and Pendergrass, asking them for a tampon, but they didn't have any either. At this point Parsons got off the phone and asked Brewer what she was doing there in building A. She answered that it was ''personal,'' and Parsons said ''on my time?'' Brewer then told him what it was for and he said ''okay.'' Brewer then went to the other side of building A and asked Mary Robinson (Gruenemeier). Robinson had one, but they had to go to building B to get it from where Robinson's personal possessions were located. Parsons followed them, at least until they got into building B. Brewer then went to the restroom and returned to work. She estimated that the whole thing took 5 to 10 minutes. Brewer did not feel that this absence interfered with production. She set up her machine when she returned and she produced 227 bottles of a product called ''one-step'' that day as compared with 230 the day before. There were other interruptions to production that day, including one for an antiunion speech. At the time the line stopped for the speech, about 10:30 a.m., Brewer testified that Parsons apologized for the earlier incident. The speech lasted 35 to 40 minutes.[72]

Later that day Brewer was called into the office with Parsons and Jim Zimmerman and given a disciplinary notice that she was suspended for 3 days for being away from her work station. When she was writing her response on the form she asked Parsons if she should put in the part about the tampon. He told her to ''tone it down a bit.'' The disciplinary notice states that Brewer had violated ''Group Two, Rule 3 (leaving work area without permission) production of 1 step rust converter (qt. size) was totally stopped. We are presently in the height of our selling season and are in a back order position of this product.''

Brewer's reply was that she ''had a personal need that needed immediate attention. Larry could not be found.[73]

[71] Apparently there is no vending machine available in the Company's restrooms, and a trip to the store would have cost Brewer at least a half a point and a loss of pay. As Blizzard had put it to Connie Robinson, Brewer could not afford many additional points to those she had in April 1991.

[72] Brewer testified that antiunion speeches were a daily occurrence during April.

[73] He was over in building A, on the telephone.

Without immediate attention I could not have continued to work.''

Parsons stated the facts of the incident pretty much the same way as had Brewer. He said he saw her talking to employees in building A. He was out of one-step gallons, and they were in a back order situation. He told her to get back to her work area. She said she had a personal problem and needed to take care of it. She did not go back to work, but went to another person in building A and talked to that employee. Parsons did state that he ''pressed her'' on her reason for being out of her work area and said that she told him her menstrual cycle had began and she was trying to borrow ''a Kotex.'' He did feel that it was uncomfortable for her to tell him that, that ''it was sure uncomfortable for me to hear it,'' and that he told her that he did not mean to embarrass her, but he denied that he apologized to her for asking the reason.

According to Parsons, the matter went to the highest level in the Company. The suspension was decided on by President Terry Merrill, Vice President John MacLeod, Vice President Dave Blizzard, and Parsons. Blizzard and MacLeod were not asked about this incident, but Merrill was. He started out a bit confused, mixing up this April 8 and 12 incidents. After being straightened out by counsel, Merrill recalled that Brewer was working on the one-step filling line. Merrill then, characteristically, embarked on a discussion about ''many many'' orders for this product, and they were out of it, in a back-order position. He then stated that ''I'm walking through again, and I find out that Ms. Brewer has left her filling machine in the middle of a shift while she's filling the product and wandering aimlessly[74]—in my opinion aimlessly—around.'' He said he ''saw her out of her work area, number one, and I was told by Mr. Parsons.'' He was ''instantly furious,'' again talking about back-orders, trying to fill the orders ''and she is off her work station wandering through the buildings.'' Merrill continued this harangue, mentioning double freight costs, competitors filling orders, never getting customers back again and becoming ''furious'' about the whole 10-minute absence by Brewer.

Mary Robinson Gruenemeier not only witnessed the incident, but joined in, to the extent of leaving her own work station and helping Brewer ease her problem. Gruenemeier testified, but, significantly, was not asked about this situation. I do not draw any inferences from this, but the absence of testimony on Gruenemeier's part indicates to me that Brewer's version of the incident was correct. I note also that the record does not mention that Gruenemeier, identified as a company loyalist, was disciplined in any way for leaving her own work station to obtain the tampon for Brewer.

Based on this evidence, I find, as has been stated before, that Brewer was a principal activist for the Union, identified to the Company as such just a little over 2 weeks before. She was disciplined on April 8 for reasons I have found to be discriminatory. The April 8 discipline was used, in part, to justify the 3-day suspension imposed for this rule violation. I cannot and do not make decisions based on working conditions which social scientists might find demeaning or primitive. No public telephones, no water in some buildings, no provision in women's restrooms to aid women caught short like Brewer. None of these things is a violation of the National Labor Relations Act. What I am concerned about here was the effect of the prior reprimand on this discipline; the fact that the decision, instead of being administered at the shop level by Parsons, was bucked up the ladder to include the whole high command of the Company, two members of which, Merrill and Blizzard, harbored strong antiunion sentiments; the fact that Parsons testified that the short fall in one-step was in gallons, where as Brewer, as alleged in the disciplinary notice, was assigned to quarts; the disparate enforcement of discipline as between Brewer, the union activist, who got a 3-day suspension, and Mary Robinson Gruenemeier, the company loyalist, who did not even get a warning; and, finally, Merrill's rage over a 10-minute production loss by one employee, when later the same day, he ordered a 35- to 40-minute antiunion speech be given to all the employees in Brewer's department.

All of this convinces me that the discipline of Brewer was excessive, considering the offense, and designed to retaliate against her for her activities on behalf of the Union, in violation of Section 8(a)(1) and (3) of the Act.

b. *The discharges of Brewer and Wood*

Paragraphs 6(a) and (b) and 7(e) and (f) allege that Sue Brewer and Velvie K. Wood were discharged on April 25 while engaged in protected, concerted activity.

On April 24, Brewer and Wood (also referred to in the record as Kathy Wood) were called separately into the office with Larry Parsons and Jim Zimmerman at 4:30 p.m. Parsons told each of them that they were transferred to the second shift effective the next day. They were to report at 4 p.m. They did not demur at the transfer, but both Brewer and Wood had problems with babysitters and had to make arrangements which would be hard to do with less than 24 hours' notice.[75] Parsons merely replied that all he was instructed to do was to tell them to be at the plant at 4 p.m. the next day. Wood protested that her husband began work at 5 p.m. and it would cost a lot of money to get a babysitter. She also reminded him that she had said the same thing to him when she was hired, and he had replied that the job (day shift) was perfect for her. Parsons responded, as he had before, that all he was instructed to do was to tell her ''to be there at 4:00 o'clock tomorrow.''

Brewer also protested and asked if she could speak to Blizzard. Parsons picked up the phone and called someone, saying to that person that ''Susan Brewer wanted to change her mind if she could'' then hung up and told Brewer that Blizzard had said ''no.''

[74] Aside from discounting Merrill's customary exaggerations, I just cannot believe, and I am no expert in these personal matters, that a woman in Brewer's urgent and embarassing position was ''wandering aimlessly around'' the plant. I think this statement was just Merrill throwing gasoline on the coals of his anger over lost production.

[75] I note that both Wood and Brewer testified that about 3:30 p.m. on April 24 they heard Parsons and Zimmerman paged over the loudspeaker, and directed to come to the office ''and bring the list, repeat, bring the list.'' Tina Pendergrass said that she was transferred to the Tal-strip line ''a couple days till the accident of Betty Bates'' (April 29), when she saw a list on Parsons' desk entitled ''break down list'' which had on it all the names of the in-plant organizers, and jobs to which they were to be transferred. I do not believe Pendergrass and I cannot see where the fact that supervisors were summoned to the office makes much difference to the issues here.

After these interviews Brewer and Wood talked to Betty Bates and Jim Newport. It was decided (I cannot tell from the record who made the decision) that the two women would come to the plant the next day at their former starting time and see what they could do.

The next day Brewer and Wood arrived at the plant at 7 a.m. They were accompanied by about 10 other employees, including Betty Bates and Tina Pendergrass (who were all scheduled to work at that time). As they walked up to the door of the plant the group was met by Parsons and Zimmerman. The supervisors asked what they were doing there, they were there 8 hours to soon and should leave. Brewer said at some point in this conversation that they wanted to see Merrill or Blizzard in order to ask for time to make arrangements to start on the second shift. Brewer asked if they were fired, Parsons said no, and she said that they were there to work; they could not come in at 4 p.m. because they had not been given time to prepare. She then read out of a ''Union book'' something about the Company not being allowed to change hours in order to get rid of employees.

Parsons and Zimmerman apparently became concerned that all this was going on in front of other employees. They then told Brewer and Wood to come inside the plant. They went in to Blizzard's office (he was not there through all of this). No sooner had they gotten there, however, when Parsons again asked them to leave, then demanded that they leave. There was some more conversation, Parsons and Zimmerman left for periods to set up the day's work, and finally Parsons called Blizzard. Merrill, however (probably after consulting counsel) called back and told Parsons to ask them again to leave, if they did not, then to discharge them. Then if they didn't leave, to call the sheriff (Merrill's version) or the police (Parsons' version). Parsons did ask them again to leave. They would not, and they were discharged. After that they left without requiring a police escort.

The Company's version of this incident was fairly consistent. Merrill testified that at the end of April he made the decision to increase the production of a product called primer surfacer. Sales were good[76] and they needed more product. The manufacturing process was lengthy, taking 8 to 10 hours to mix and another 8 hours to fill containers. Thus, in an ordinary 40-hour week, the Company could make only 2-1/2 batches. Merrill ordered that a second shift be set up to do the filling, so that the day shift could make five batches, which would then be filled by the night shift each week, doubling their production.

Merrill did not make the determination as to who was going to be transferred to the second shift to implement the filling part of the increased production. This was left up to Blizzard. Blizzard testified that there were four employees who were qualified for the filling operation. Brewer, Wood, Pam McNew, and Al Isaac. Of these Isaac was the most versatile, McNew had the most seniority, so Brewer and Wood were left to be transferred. All the management people who testified about this said that union activity had nothing to do with the selection. By this time Brewer, Wood, and McNew were all named as in-plant organizers. Isaac was still maintaining to management that he was antiunion.

[76] Parsons testified that an advertising campaign for the product was underway at that time.

Parsons and Zimmerman testified that they were at the plant when Brewer and Wood came up to the entrance. Parsons told them they were not scheduled to be there until the evening shift and asked them to leave. Brewer read something from a book, or a ''union book,'' according to Zimmerman, and refused to leave. Parsons told Brewer that if she had been wronged there was a way to address it, but to leave the property. They still did not leave, and the other employees were standing looking at this confrontation. Zimmerman suggested that he and Parsons take Brewer and Wood inside. Again Parsons requested that they leave and they would not. After some minutes of this Parsons called Blizzard at his home and advised him of the problem.

It is probable that Blizzard called Merrill, but Blizzard did not mention this in his testimony. Instead Merrill stated that Parsons called him that morning, and he told Parsons to tell them to leave and if they didn't, to call the sheriff's office and ''haul them off.'' He ordered their discharge because they were ''totally, 1000 percent, insubordinate!''

I believe the General Counsel has established a prima facie case here under *Wright Line*, supra, that the Respondent has demonstrated open hostility to the Union and to its adherents. Both Brewer and Wood had been identified as in-plant union organizers by letters from the Union to the Company prior to April 25. The Company's antiunion hostility has been expressed, as I have found, directly to Brewer in her warning and suspension discussed just before this section of this decision. The assignment to the night shift was made with less than 24 hours to obtain babysitters and make other domestic arrangements and in a manner which permitted no appeal of management's decision, Parsons merely repeated that he had been instructed to inform them of their transfer.

I have noted this treatment, as contrasted with the solicitous treatment given to people on the night shift on the day after the election, May 11. Pam McNew testified that Chris Dixon and Blizzard came to the night-shift employees to tell them that the night shift was being discontinued and they were going back to days. Pam McNew testified that Blizzard and Dixon gave them 2 to 3 days to take care of babysitters ''or anything,'' to go to the day shift.[77]

I believe that on these facts I could find that General Counsel has established a prima facie case that the short notice for the transfer with no opportunity to make domestic arrangements was a ploy to force these employees to miss work (which would have been serious for Brewer, who had a number of attendance points) or to quit.

The Respondent's defense to this is based on its assertions through the testimony of Merrill, Blizzard, and Parsons that there was a demand for the production of primer which could be satisfied by moving the filling part of the operation to the night shift. This is logical enough, and it presents me with no problems but there was nothing in the testimony of any

[77] I note also the timing of this discontinuation of the night shift. Pam McNew was assigned to the night shift after Brewer and Wood were discharged. Then, when the election was over, the production crisis requiring Brewer and Wood to transfer to nights must also have ended. This timing does not seem to corroborate Respondent's stated reasons for the transfer of Brewer and Wood. If, on the other hand, McNew was assigned to the aerosol line on the night shift, as her testimony indicates, then why was she not assigned to the night shift to replace Brewer and Wood, supposedly to fill primer surfacer.

of these management officials, or any where else, to justify the summary movement of employees from days to nights. There was no indication in any of the testimony to denote an emergency or a crisis in turning out larger quantities or primer. No reason has been shown that this was a business necessity or that it was a customary business practice.

I, thus, find that by transferring Brewer and Wood abruptly and with no opportunity to take care of personal affairs, Respondent was retaliating against them for their activities on behalf of the Union, and this action by Respondent violated Section 8(a)(1) of the Act.

As can be seen from the testimony, Brewer and Wood did not quit, nor did they absent themselves from work. When they showed up at the plant the next day to protest the Company's actions in transferring them, I find that, as a matter of law, they were protesting the Company's unfair labor practice. The employees who accompanied Brewer and Wood were also engaging in concerted activity with them in protect against the Company's action.

We cannot speculate about what might have happened if Brewer and Wood had remained at the plant entrance, but it is evident that Parsons and Zimmerman were upset that other employees were watching this scene at the entrance, and that they invited Brewer and Wood into the office, rather than continue a possibly embarrassing scene outside. Having invited them in, Parsons and Zimmerman then invited, or ordered, them to leave. Brewer and Wood insisted that they wanted to work, and that they wanted to talk to Blizzard and Merrill about the lack of time given them by Parsons on the previous afternoon. At no time did the two women say that they were refusing, or would refuse, to work that evening, but the Company gave them no chance to do that. They continued to refuse to leave and were summarily discharged.

There is no evidence here that any employee lost time from work, or that the workplace was in any way disrupted. While Parsons and Zimmerman said that their work was interfered with by Brewer and Wood, Brewer stated that each of the supervisors left the office from time to time to set up the day's work. I do not believe that there was any loss of production that day because of this incident.

There was no shouting, no hysteria, no obscenities, no physical threats or violence here. Brewer and Wood did refuse to leave, but their complaint was concerted and legitimate. I believe that this activity, occurring as a result of Respondent's unfair labor practices, was protected by Section 7, and I find that these discharges violated Section 8(a)(1) of the Act. See *NLRB v. CER Inc.*, 762 F.2d 482 (5th Cir. 1985).[78]

E. *Allegations Under Section 8(a)(1) and (3)*

1. Denial of overtime to Elaine Jones

The complaint alleges in paragraph 7(o) that about May 10, the Respondent denied Elaine Jones the opportunity to work overtime.

As I have found above, in section III,B,3,b, an allegation involving alleged interrogation of Jones by Parsons and Zimmerman should be dismissed. The alleged violation of paragraph 7(o), here, rests on assumptions that Jones was engaged in union activity, and that the Company was aware of it. As of the date of the election, May 10, the date on which the alleged denial of overtime began, the only substantial evidence to warrant those assumptions was Blizzard's comment to OSHA that Jones was a union sympathizer.[79]

As to the availability of overtime, the General Counsel has introduced a number of timecards intended to show that others received overtime in the weeks following the election of May 10 and Jones did not. However, the mere entering of timecards, without testimony showing the relationship of employees, except for one Joyce Smith, a short-time employee, and with no differentiation as to who was doing what job, does not make a strong case. Since there was some doubt whether the Company had knowledge of union activities, and in view of the less than substantial evidence presented by the timecards, I do not feel that the General Counsel has made a prima facie case on this allegation, and I shall recommend that it be dismissed.

2. Restrictions to work area

Paragraph 7(c) of the complaint alleges that about April 17 the Company restricted Tina Pendergrass and Teresa Kee to their work area.

Pendergrass worked in the department called ''Canadian.'' This was a reference to products being packaged for sale in Canada, requiring labels in French and, presumably, packaged in metric sizes. Pendergrass was an early union supporter and was named as an in-plant union organizer in the Union's letter to Merrill dated April 15. A day or so after that, Pendergrass said that Merrill came up to her with a copy of the April 15 letter and asked her if that was her name which appeared on it.[80] She admitted that it was, and he walked away.

On the same afternoon Parsons informed her and Teresa Kee, who was her partner in the same area, that they were restricted to their work area, and could no longer leave the area to get cans, boxes, or other things they used in their jobs. Kee corroborated this,[81] pointing out that when they

[78] Respondent's citation of *Carolina Freight Carriers Corp.*, 295 NLRB 1080 (1989), is not on point. That case involved a discharge over a disputed point in a collective-bargaining agreement where the discharged employee had recourse to a grievance an arbitration procedure. In the present case there were no such procedures. Indeed Brewer and Wood were asking for some kind of appeal to higher authority, but this request was not granted.

[79] Jones had not been active in the Union, but Blizzard viewed her as a union supporter when he talked to OSHA investigators in mid-May. After the election she was elected to the negotiating committee by the membership, and on August 28, Jim Newport wrote to the Company, informing them of this fact. There is no indication that she was refused overtime after August 28, and no indication that she participated in union activity before that time. Respondent's position is that this allegation should be dismissed because timecards introduced into evidence (G.C. Exh. 95 G) show that Jones did work overtime on the date of the election. Since the complaint uses that date, this allegation has not been proven. I reject this argument, partly because the complaint uses ''about May 10,'' rather than just the date; and also because the Respondent had the opportunity to litigate the allegations in Jones' testimony that the loss of overtime continued though the month of June.

[80] Merrill did this to several other employees, including Pam McNew.

[81] As noted, I feel that I need corroboration to any substantive testimony by Pendergrass. Kee impressed me as a credible witness, and

Continued

needed cans to replace broken or damaged ones, they now had to call shipping to have cans sent over.

Looking back on the restrictions applied to Curtis Compton, and forward to restrictions placed on employees in the aerosol room, to Merrill's reaction to news of his employees' union activities, and to the timing of the new restrictions, I find that this change in working conditions was effected in retaliation for Pendergrass' union activities,[82] and a violation of Section 8(a)(1) of the Act.

3. Health forms and physical examinations

a. *Tina Pendergrass and Teresa Kee*

Paragraph 7(p) of the complaint alleges that about May 21 the Company required Tina Pendergrass and Teresa Kee to sign medical release forms in order to return to work after being injured. Paragraph 7(g) alleges that about May 21, the Company refused to permit Tina Pendergrass to return to work.

Both Kee and Pendergrass were transferred to the aerosol room in April. On May 15, both became ill during the workday and were sent home. On the following Monday they returned and attempted to go back to work. They met with Pete Burnside and Larry Parsons, who first accused them of ''faking,'' then told them they had to sign forms agreeing to be examined by a physician chosen by the Company, consenting to whatever examinations that physician required, and consenting to release to the Company the results of any such examinations by the Company's physician, or any other physician, for use by the Company for almost any purpose.

Kee testified that she and Pendergrass at first refused to sign. Parsons and Burnside called them in and told them they had 24 hours to think about it, and if they didn't sign, they would be fired for insubordination. They went home, thought it over, and returned to the Company the next day and signed the forms. They were then told to go home and call John MacLeod later for appointments to see ''one of their doctors.'' Kee did this, went to see a company doctor about a week later, then returned to work.

Pendergrass testified that Parsons and Burnside accused her of faking and wanted her to see a company doctor. They asked her to sign the form and she refused. She testified that she talked to Jim Newport and told her to go ahead and sign it. She did sign it, and called John MacLeod, who got her an appointment with a Dr. Randolph.[83] Dr. Randolph would not give her a release, so she saw a specialist, who examined and released her. She returned to work after that.[84]

No company witnesses testified as to these incidents.

I have no quarrel with the Company's argument that it had, and has, the right to attempt to verify the reasons for absences, and the right to insist on medical examinations for employees returning from sicknesses or industrial accidents. People must be well, and physically able to perform their jobs, for their own safety and the safety of others. If the Company had told Pendergrass and Kee that they could not come back to work until they signed the release forms, I do not think I would have found a violation. However, we had here a concerted refusal on the part of Kee and Pendergrass not to sign the releases. I believe that such refusal was protected, and that the Company's response, that if they did not, they would be fired for insubordination, was a violation of the rights of these employees, and I find in paragraph 7(p) a violation of Section 8(a)(1) of the Act.

After signing the forms, Kee got her appointment with a company doctor, was released, and returned to work. Pendergrass, on the other hand, had some kind of thyroid condition. Dr. Randolph may have been legitimately concerned with this and properly wanted to have Pendergrass examined by a specialist. If all this took a few more days than Kee's situation, I do not see how the Company itself can be held to blame for this.[85] I will recommend, in these circumstances, that paragraph 7(g) be dismissed.

b. *Betty Bates*

Paragraph 7(s) of the complaint alleges that Betty Bates, returning to work on July 8 after being absent because of illness, was faced with the same requirements, and that she signed the form, but was not allowed to return to work until July 16. There is no evidence here that she was threatened with discharge for refusal to sign the form. I do not believe that the mere requirements to sign forms or be examined by company doctors constitute violations of Section 8(a)(1) and (3) and I recommend that this paragraph 7(s) be dismissed.

F. *The Aerosol Room*

1. Background and operation

Conrad Burnside, known throughout this record as ''Pete'' Burnside, was Respondent's supervisor of warehousing and assembly line (the aerosol line). Terry Merrill testified that the Company had for some years contracted out the canning and packaging of aerosol products sold under Talsol's brand names. Merrill was not satisfied with the speed of this process, nor the cost, or the quality. In 1990, the Company installed its own aerosol canning and packaging line, and hired Pete Burnside to run it.

This line was located in its own separate area, known as the aerosol room. While there is no direct evidence of the separation between the aerosol room and other manufacturing areas, I note that the operation had separate ventilation equipment, was separated from other facilities, and had its closed-in construction. These characteristics, do, in fact separate this area distinctly from other areas of the plant.

Up until early 1991 the line was run on what was called a ''single indexing'' system, that is, only one can was filled at a time. In 1991 the filling machine was modified to fill

I accept her version, and Pendergrass' version, which is in agreement with it.

[82] Kee also became a union in-plant organizer, but the Company was not notified of this until a letter of April 23 from the Union to Terry Merrill.

[83] David Randolph, M.D., who later testified as a company witness, at first denied having an ongoing relationship with Talsol, later admitting that he saw patients ''periodically'' for Talsol. I found his responses to these questions less than candid, and, frankly, evasive.

[84] I have disregarded most of Pendergrass' testimony in this issue. I do believe that she went to Dr. Randolph, that he refused to release her, and that she then went to another doctor to obtain a release to return to work.

[85] See Dr. Randolph's testimony in Pam McNew's situation, below; illustrating the different opinions physicians may have about the same physical complaint by a patient.

two cans at a time, ''double indexing.'' Along the way other parts of the process were automated.

At the start of the operation, the cans are loaded on the line. Then a steel ball is automatically dropped into each can. The cans move to the fillers, where they are filled with whatever product, paint, striper, finish is being processed.[86] After filling, valves are installed manually in each can, the cans are automatically crimped and checked for proper vacuum. Tips are automatically installed, the cans move to the ''gas house'' to be loaded with propellant, they go through a warm water bath to check for weaknesses or leaks, they are automatically labeled and manually capped, then, finally, reach the end of the line, where an employee boxes them, moves the boxes onto a belt to be sealed, and moves the sealed boxes off the line onto skids (or pallets).

With this more automated system, only four employees are required; one loading cans on the line, one installing valves, one capping, and one person boxing and unloading the line.[87] This figure of four employees does not include a mechanic and a quality control person, both of whom participate in the running of the operation.

A film clip was shown at the hearing, and entered into evidence as Respondent's Exhibit 40, showing the operations substantially as testified to by Burnside, with the exception that all phases of the operation are not shown in the film. I have viewed the film several times and I find from the film, as well as all the testimony about the aerosol operation, that the jobs on the line are not skilled or even semi-skilled in content. The tasks are repetitious, not difficult and not heavy, except for the removal of sealed cases from the line to skids. I note that Burnside testified that all of the workers on the film clip were temporary employees (hired by the Company on a contract basis). Burnside estimated that employees needed 3 to 6 weeks to be trained for these jobs, but my observation of at least some of those jobs being performed on the film convinces me that only minimum training would suffice.

Burnside also testified that the line holds 285 cans from one end to the other. The speed of the line is determined by how many cans per minute (cpm) can be filled by the automatic fillers. He stated that when they were operating under a single index system, the line production never exceeded 26–30 cpm. On double indexing, they could run as high as 70 cpm, but actually averaged only 45–50 cpm. Burnside estimated that on an 8-hour shift, he got only 455 work minutes, 7 hours and 36 minutes, out of his workers. Many factors contributed to slowdowns on the line, equipment failure, accidents, jammed machines, or human error. I note that line speed may vary considerably in those circumstances, and speeding up or slowing line speed will not result, necessarily, in increase or decreased cpm figures.[88]

[86] The paint is made in another part of the plant and is moved to a fill room outside of the aerosol room itself, then cans are filled by gravity from the supply.

[87] Some products are packed six to a box. When this occurs another person is assigned to unloading.

[88] Therefore, figures such as those submitted by the General Counsel can be misleading. I have made my findings on line speeds on the basis of credible testimony of employees who were familiar with the line through their own experience.

2. Transfers to the aerosol line

Paragraph 7(g) of the complaint alleges that Betty Bates was transferred to the aerosol line on April 24, 1991. Paragraph 7(k) alleges that Tina Pendergrass, Treasure Chestnut, Teresa Kee, and Vicki Maxfield were transferred to the aerosol line on April 29, 1991; and paragraph 5(a) of the complaint in Cases 9–CA–29183 and 9–CA–29351, issued on March 20, 1992, alleges that Al Isaac, Elaine Jones, and Debbie Middleton were transferred to the aerosol line on September 4, 1991.[89]

All of these transfers are alleged to be in retaliation for the transferees' union or concerted activities.

Betty Bates was working in building A on Canadian products on April 24, the day after Merrill had spoken to the building A employees.[90] Larry Parsons told her to get her personal belongings, that she was going to be ''cross-trained.'' She worked in the aerosol room until she collapsed on April 29 and was taken out of the plant by ambulance.[91]

Tina Pendergrass testified that she was transferred to the aerosol line on the same day that Betty Bates became ill. Pendergrass did not say that anyone told her she was to be cross-trained in the aerosol room.[92]

Treasure Chestnut testified that on the morning of April 29, Terry Merrill asked her if she was on the in-house organizing committee. She said she didn't know what he was talking about. He went and got a letter of April 25 to him from Jim Newport, naming Chestnut as an in-plant organizer. He had John MacLeod with him and he said he was not interrogating her but was just confirming something. He asked if that was her name on there, saying ''the Union can lie but we can't.''

After lunch that same day, Larry Parsons came to Chestnut and told her to go to the aerosol room. He gave her no reason, and she reported as ordered.

Teresa Kee had an experience similar to Chestnut's. After the Union's April 25 letter was received, Terry Merrill and John MacLeod came up to Kee. Merrill asked if that was her name on the letter (as an in-plant organizer). She asked ''what does it say?'' Merrill replied that sometimes people lie when they put things on paper. Later that day she was sent to the aerosol line. As with Bates, Parsons told Kee that she was being cross-trained.

Victoria (Vickie) Maxfield testified that she was working on the hardener line when she was confronted by Merrill

[89] I noted that there is no allegation in these complaints that Pam McNew was transferred to the aerosol line, but she was transferred, according to her testimony, a few days after the Company received the April 15 letter from the Union to Merrill identifying McNew as an in-plant organizer. She was, however, transferred to the aerosol line on the night shift. I note, in this connection, that she was not transferred to the job of filling primer, the job to which Blizzard transferred Brewer and Velvie Wood on April 24, leaving McNew, who ''had more seniority'' on the day shift. This is just another inconsistency in which the Respondent has tangled itself. Since this transfer is not mentioned in the complaint. I will make no finding on it.

[90] See sec. III,B,1,b.

[91] See secs. III,B,2,d and j.

[92] All of the employees who were transferred to the aerosol line at this time testified that they had some experience working there, either on overtime or filling in when people were absent for short periods.

With her name on the Union's April 25 letter. She said it was. That occurred about 11 or 11:15 in the morning. That afternoon Maxfield was told by Parsons that she was being sent to the aerosol line for cross-training.[93]

Merrill testified about these transfers, saying that ''directly or indirectly'' it was his idea. He said that he told people he needed ''some cross-training on everybody. Start training everyone'' He told Blizzard to start this program, but it had nothing to do with the Union.

Blizzard said, in his testimony, that Merrill wanted to add versatility to people who worked in the aerosol room and he told Blizzard to transfer these people to packaging jobs. Geraldine Broadus, Debbie Middleton, Ruth Edmondson, Michelle Smith, and Lois Phillips were transferred out to make room for the other employees named above.

Broadus and Middleton testified about their experiences in and out of the aerosol room[94] but neither they, nor anyone else who testified here, mentioned one word about receiving any training, ''cross'' or otherwise. As I indicated above, concerning my impression from the film clip of the aerosol operation, and my conclusions from other testimony here, the jobs in this plant are essentially unskilled, mechanically repetitive tasks which require no training other than basic instructions and experience to gain competence in these simple functions. There is no evidence of any sort of training in this plant, and no demonstrated business reason for the transfers of five in-plant organizers, within days of the Company's receiving notice of their union activities, to the aerosol line where, as will be seen, they suffered harassment, discomfort, injuries, warnings, and suspensions, and, ultimately, either disability discharge or resignations. In this separated area, apart from the plant and other workers, the Union in-plant organizers could be quarantined off from other employees. The Company's ''siege mentality,'' and its angry, even frenzied, reactions to the exposure of knowledge about its processes and practices, lead to my conclusion that the aerosol room lent itself to use as a kind of insulated holding pen to prevent the spread of unionism among its employees. I find, therefore, that by transferring Pendergrass, Chestnut, Kee, Maxfield, and Bates to the aerosol line, Respondent was retaliating against them for their union activities in violation of Section 8(a)(1) and (3) of the Act.

It follows, then, that the assignment to the aerosol line, was a punishment for union activities and a separation of known union activists, and the assignments of Al Isaac, Elaine Jones, and Debbie Middleton to the line in September are further violations of Section 8(a)(1) and (3).

3. Conditions of the aerosol line

Paragraph 7(l) of the complaint alleges that, about April 29, the Company intentionally speeded up the aerosol line, closed doors and shut off fans, and denied employees the right to take breaks to use restrooms or use drinking fountains. Paragraph 7(gg) alleges that the Company, from mid-September to mid-November 1991, imposed more onerous working conditions on employees in the aerosol room, including menial tasks not part of their regular duties. Paragraph 7(hh) alleges that, about November 5, the Company required employees Al Isaac, Betty Bates, Elaine Jones, and Debbie Middleton to submit to physical examinations and suspended Middleton because of the results of her examination.

Before considering the allegations here, I will first consider the question of the speed of the line. Both the General Counsel and the Respondent have submitted statistics and claim that those figures are favorable to their respective positions. As in the incident involving Geraldine Broadus,[95] I rely here on the testimony of those working on, and familiar with, the line.[96] Charles Bailey, the aerosol line mechanic, did not testify, but I do not read any significance into that. It is too easy to manipulate the speed of the line even for short periods where production figures, or cpm numbers, would not reflect a speedup or slowdown. Any statistics based on hours of operation, or raw production numbers, could be distorted and inaccurate. In the film clip (R. Exh. 40) when the line speed was estimated at 48 cpm, I noted that the temporary employee at the end of the line in the boxing and stocking operation was obviously hurried.[97]

As to the speed of the line and its effect on employees, a number of employees testified.

Connie Robinson was transferred in to the line on May 15.[98] She had worked on the line before, on overtime, when necessary, but was given no ''cross training'' in May 1991. She was assigned to the beginning of the line, installing valve stems. Burnside yelled at her that if valve stems were not installed properly, they would float up in the can, would stop the machine and shut down the whole line. He told her that the line was ''only'' moving at 51 cpm, it was going to go faster and she would keep up. She did manage to keep up, but at breaktime she was moved to the beginning of the line, putting the empty cans on the line. While she was doing this she tripped on a skid that was ''too close to the machine'' and fell down. Robinson's sister Bonnie Wilson, who was also working on the aerosol line, ''hollered[99] to Burnside that Connie was hurt. He would not stop the line, and would not help Robinson up off the floor. He finally came over and told her either to go to the clinic or get back

[93] At this point, the afternoon of April 29, out of the 10 employees named by the Union as in-plant organizers, Sue Brewer and Velvie Wood had been discharged on April 25, Betty Bates, Tina Pendergrass, Treasure Chestnut, Teresa Kee, and Vickie Maxfield had been transferred to the day shift on the aerosol line, and Pam McNew had been transferred to the aerosol night shift. This left only Curtis Compton, who was still a paintmaker, but restricted in his movements. The only in-plant organizer who was not fired, reassigned, or restricted was Judy Quillen, about whom not a word appears in this record.

[94] See sec. III,C,1, above.

[95] See sec. III,C,1, above.

[96] Pete Burnside estimated the speed of the line as shown on the film clip, made in December 1992, at 48 cpm. He based that estimate not on statistics, but on his count of the number of thumps, audible in the film clip, made by the filler machines filling cans with product. As Burnside stated, the speed of filling determines the speed of the line.

[97] She was moving fast on her return from stacking boxes on a skid to the boxing area at the end of the line. The film did not show her moving from boxing to stacking, but I infer that she had to move fast there also.

[98] She had had an exchange with Blizzard on May 10, see sec. III,B,2,e, above.

[99] The noise level in the aerosol room was high. Burnside said it was louder than it seems to be on the film clip, and Joan Gearden testified that she spoke to management about hearing protection for aerosol employees.

to work. Finally Teresa Case helped Robinson into a chair, and then drove her to Bethesda Clinic.[100]

Robinson testified that she had not worked since May and was discharged by Respondent on October 3, 1991.[101]

Treasure Chestnut reported to the aerosol room on April 29. She said it was hot, the fans were off, and the (outside) doors were closed.[102] Chestnut stated Burnside had denied her request to open the doors and turn on the fans, but after Betty Bates had to leave he said, ''I guess you girls want the fans turned on and the doors opened.''

Chestnut also said that while she was working, on May 8, she heard Burnside say to mechanic Charles Bailey to ''speed up the line until she couldn't keep up.'' Chestnut then observed that the line was going faster. Burnside did say to Chestnut, between April 29 and May 15, that the line was being run faster because the Company wanted a 3-month supply of products for ''when us people went on strike.''

Chestnut mentioned another incident on May 13 when she was inserting valve stems in cans containing a solvent called ''towel strip.'' The solvent was splashing out of the cans and burning her skin, so she put a household-style rubber glove on the hand that was used to insert the stems. Burnside came up and told her that the glove was slowing her up, and to take it off.

On May 15, Chestnut tripped over a wire and was hurt. She returned to work on May 24.[103]

On May 29, Chestnut was shifted to the end of the line, where she received a stream of abuse from Burnside over her work at boxing and stocking. She was then assigned to the gas house (where the propellant is inserted into the cans). She was instructed by Bailey to take the tips out of the cans. One of the cans exploded and Chestnut was injured. She was later discharged.[104]

Victoria (Vickie) Maxfield was transferred to the aerosol line on April 29. She had worked there once or twice before when some one was out sick or they were short-handed. She was given no training, but was told by Burnside to move faster. That first week was hot and humid the whole week. She asked Burnside if she could get a drink of water and he replied she could get it on her break.[105] Maxfield confirmed Chestnut's story about Burnside telling Bailey to speed up the line so they couldn't keep up.

Maxfield resigned at the end of June because they were put on a mandatory 12-hour day and she could not work that much.

Bonnie Wilson, Connie Robinson's sister, was assigned with her to the aerosol line on May 15. She recalled Burnside's statements that they would get production out, ''no matter what,'' and his remarks, after their break, that the line was going ''very, very, fast'' and that they would keep up ''no matter what.'' When he was asked how fast it was going, he said 52 but he could turn it up to 62. Burnside also told them, that day, that they could not leave to go to the bathroom without his permission. This applied whether the line was running or not.

After that they were running stripper and Wilson got some splashed into her eye. She left and did not come back until May 28. On that day she got overheated and Blizzard took her to his (air-conditioned) office.[106] That afternoon Blizzard took her to his office again and told her that they were watching her, and she was not to talk to the OSHA investigator Joan Geaden. Later Wilson was injured while working with Chestnut in the gas house. She had not returned to work at the time of this hearing, but she had been fired as of October 3, 1991.[107]

Teresa Kee was transferred in to the aerosol room on April 24. It was hot, the doors were shut, and the fans turned off. Kee asked Burnside to turn on the fans and open the doors. He said he couldn't because the Company was trying to save electricity.

After lunch Kee was putting stems in cans. Burnside said that they were going to turn the line up to 55 cpm. The line was going extremely fast and Kee ended up missing some stems, some cans exploded in the gas house, and Burnside turned off the line.

On May 15 Kee, along with Tina Pendergrass, got sick and went home. Kee returned a week or so later[108] and quit in June.

Pamela R. (Pam) McNew had worked on the aerosol line night shift from around April 24 until after the election on May 10.

On May 22 it was very hot. The fans were on but they did little good. McNew went to the restroom feeling ill. When she came out Blizzard and Burnside were there. They asked her if she was all right. She said she thought so, but Burnside said she couldn't work. Blizzard brought her to the office and gave her some water. She then went home and saw the Company's doctor.[109]

She came back on May 28. Blizzard met with her and accused her of lying. He said he didn't send her to the company doctor that she lied about it, and he fired her. As she had been the person who filed the complaint with OSHA, she went to that agency. She was then reinstated on June 3 by an agreement between the Company and OSHA. When she came back she was assigned to the solvent line for 2 weeks then back to the aerosol line.

Betty Bates was transferred to the aerosol line on April 24 with Teresa Kee. On April 26 Bates became nauseated from fumes. She went to the restroom and met Blizzard when she came out. He asked her if she wanted to go to a doctor. She said no, the day was almost over, and she would stick it out. That morning, Blizzard came up to Bates at the aerosol line. He said, ''You've had it easy up to now, but now you're going to work.'' He said he couldn't understand why she

[100] A medical facility used by the Company.

[101] She testified that she filed a charge with the Regional Office, concerning her discharge, but that charge was dismissed.

[102] The Respondent supplied, for this record, a chart published by the National Oceanic and Atmospheric Administration (NOAA), more commonly referred to as the Weather Bureau, showing temperatures and humidity for the Cincinnati area for April 1991. The chart shows that April 29 was the hottest day of the month with a high of 77 degrees Fahrenheit, 12 degrees Fahrenheit above normal for the date (R. Exh. 64).

[103] For her interview with Blizzard that day, see sec. III,C,2.

[104] Chestnut also filed a charge with the Regional Office, which was dismissed.

[105] There was no water fountain in the aerosol room. Employees had to go to another building to get a drink.

[106] Later that day Wilson had another talk with Blizzard. See sec. III,B,2,h.

[107] Wilson also filed charges, which were dismissed.

[108] See sec. III,E,3,a, above.

[109] McNew said the line was running fast. Geraldine Broadus observed that after McNew left, the line slowed down. See sec. III,c,1.

went from the Company to the Union. She said it was because she was demoted after being so loyal to the Company and had money taken away from her. Why else wouldn't she go to the Union? Blizzard said: ''That's not all we're going to do to you.''

On April 29, Bates said the aerosol room was ''like a sauna.'' She asked Burnside if they could open the doors and turn on the fans, and he said no. She was sweating, her glasses were steamed up, and her face flushed. She felt that the line was running faster than she had experienced before.

Blizzard came up to her and told her she would have to pick up her pace. He again mentioned that she was on the wrong side, but now she was going to work. She said she had nothing against the work, but please open the doors and turn on the fans. Blizzard answered that they couldn't open the doors, and told Bates to tell Newport to quit making threats against the lives of himself and Merrill. That was the reason the doors weren't open. She asked about the fans and he said, ''I guess they're broken.'' Soon after that Bates collapsed and was taken to a hospital.

She remained in the hospital for 5 days, diagnosed as a near heat stroke. She remained out until July 16. She went back to the aerosol line. While working on that day or the day after, she asked Debbie, the quality control person there, to relieve her while she went to the restroom. When she got back Burnside told her not to do that again, that Tina Pendergrass had been written up and suspended for the same thing.

About September 4, Al Isaac, Elaine Jones, and Debbie Middleton were transferred to the aerosol line. Isaac had been elected employee representative in the OSHA investigation, Elaine Jones was an elected union shop steward, and Debbie Middleton had been accused by Blizzard of having been ''corrupted'' by Pam McNew.

Tina Pendergrass testified about some of these matters. While I do not credit her testimony generally, I find that she was subject to the same discriminating treatment as others whose testimony I do credit.

Pete Burnside testified that he never ordered the line speeded up to retaliate against employees. He did say that with the double indexing of the aerosol line, they were able to eliminate the second shift in April and handle all production on the first shift. He claimed that the line speed was not increased in May, but had been increased at the time double indexing was started, and was running in the 40 cpm range in May.

Paragraph 7(l) of the complaint alleges that the Company speeded up the aerosol line and denied employees the right to use restrooms or get water to drink.

Burnside denied that people were not allowed to go to the restrooms or drinking fountains, but he did admit he changed his policy in April. He claimed that people were abusing his policy, and he ''started losing control of where the people were at.'' Two people were causing problems, Pendergrass and Bates, and their disappearances from the work area were interfering with the work. Burnside then required all the employees to obtain Burnside's permission before leaving the department. Before, when the line was running, people could contact him, the quality control person, or the line mechanic to be relieved to go to the restrooms or drinking fountains. He changed that to require that the employees see him personally to be relieved.

Burnside denied speeding up the line or telling Charles Bailey to speed it up. He admitted that he is a strict manager, admitted yelling, but denied he called employees stupid or yelled any more than necessary to be heard over the noise of the line. Burnside denied keeping the door closed to create an ''oppressive work environment.''[110] He remarked something about security and said he didn't mind the atmosphere in the aerosol room.

Burnside was also led into commenting on the numbers of people taken ill and injured during this time.

The circumstances here, where a group of six[111] employees transferred into the aerosol room in April and May allegedly for cross-training, all of whom were members of the in-plant organizing committee, replacing five employees, none of whom were members of any in-plant committee, or otherwise identified (up to then) as union supporters, and who also were allegedly destined for cross-training, are certainly suspicious. The more so because there is no evidence of any cross-training for anybody, or any business reason for such training in this low-skilled atmosphere, beyond Terry Merrill's expressed desire to move and cross-train people.

So people were moved around, in the middle of a closely fought union campaign, moving six in-plant organizers into a separate manufacturing location within the plant, where, perhaps they could organize each other. Two other in-plant organizers, Brewer and Wood, had been fired on April 24, leaving only two still outside the aerosol room, Compton, who was restricted in his movements, and the unknown Judy Quillen.

The evidence is also clear that, when these employees arrived in the aerosol room, their movements were restricted, first, by the confining nature of the work, and, second, by Burnside's orders that, whether the line was running or not they must seek his permission to go to the restroom, or get a drink. Burnside's explanation, that Pendergrass and Bates abused the prior system, is not credible. There is no evidence, apart from Burnside's bare assertion, that anyone abused the system.

The employees were also subject to cruel and oppressive working conditions. The statements by Blizzard that Bates was ''really going to work now,'' and Burnside's remarks that the line was going to be speeded up and the employees would ''keep up, regardless'' were warnings that conditions were going to be harder. Closing the outside doors and turning off ventilating fans on the hottest day thus far in the year, on a flimsy excuse that a threatening telephone call had been received by a secretary in the office, shows an intention to impose oppressive working conditions on these union supporters.

Moreover, in an atmosphere loud with the noise of machinery, and with the shouts and abuse coming from Burnside, in a hot, humid, environment with a speeded-up production line, it is little wonder that employees became ill or injured. I am sure that Connie Robinson did not purposely fall over a misplaced skid. Burnside's comment to her, when

[110] Counsel's words. I note that almost all of Burnside's testimony was elicited by series of leading questions, questions which clearly suggested the answer. There was no objection, but this method of questioning does have a bearing on the weight I give to the answer derived.

[111] The five named by Burnside, plus Teresa Kee, who was moved into the aerosol room on April 24.

she was laying on the floor of the plant, to get up and go to the clinic, or go back to work, is particularly cruel. Bonnie Wilson did not intentionally splash solvent into her eye, even though Blizzard may have, as he said, gotten solvent on himself, washed it off, and continued to work, unlike ''Union troublemakers.'' Treasure Chestnut did not purposely trip over an electric cord, and Bates, Kee, McNew, and Pendergrass did not willfully sicken themselves from fumes, heat, and humidity.

On the basis of all these findings, I find that Respondent did move Bates, Kee, McNew, Pendergrass, and Maxfield into the aerosol room in retaliation for their union activities, that Respondent subjected these employees there with isolated and oppressive working conditions, and undue restrictions on their movements, and in their use of restrooms and drinking facilities, all to prevent their engaging in union activities in violation of Section 8(a)(1) and (3) of the Act.

4. Layoffs on the aerosol line

Paragraph 7(aa) of the complaint alleges that on September 4, 5, and 10, 1991, employees in the aerosol room were laid off. By the end of the summer in 1991, Maxfield and Kee had quit; Robinson, Wilson, Chestnut, and McNew were out on sick or injured leave; and Pendergrass and Betty Bates were the only survivors of the original group transferred into the aerosol room in April and May. Pendergrass was fired on September 13. But before that on several earlier dates, September 4, 5, and 10, the employees in the aerosol room were sent home early, around 9 or 9:30 a.m. by Burnside, who told them that there was no work.

This had never happened before, according to Al Isaac, who had 13 or so years' experience with the Company in 1991. Isaac said that in his years of experience no employees had been sent home in the middle of a shift. If work ran out they were reassigned to another job to finish up the day. Burnside told the employees this was a new policy and from now on they were going to be sent home whenever there was no work on the aerosol line.

5. More onerous working conditions for aerosol employees

The complaint alleges in paragraph 7(gg) that employees in the aerosol room were given more onerous working conditions from September to November 1991.

After September 10, there was another change. Instead of being sent home, the aerosol employees were assigned to cleaning tasks in the aerosol room and throughout the plant. They were given wire brushes, putty knives, solvents, and strippers and were set to cleaning paint off the floors of the plant. They were also told to clean what were described as ''filthy'' restrooms, to shovel or sweep snow, to pull weeds, and do a number of tasks that, according to Isaac and Bates, production employees had never done before.

In regard to this last, I note that there was testimony from Teresa Kee about similar work done in April, and from Curtis Compton about nonproduction work assigned in May and June. I do not think there is enough evidence that this kind of work, difficult and menial though it may be, was so difficult than what would be reasonably required almost continually in a paint factory to find that it was imposed in retaliation for union activities.

On the layoffs, however, I find that this constituted a new and changed condition of employment, and because of the extensive retaliatory practices by Respondent, I find that the purpose of this, too, was to punish employees for having chosen the Union as their representative, in violation of Section 8(a)(1) and (3) of the Act.

6. Disciplinary actions in the aerosol room

The complaint alleges a number of instances of discipline meted out to employees in the aerosol room in the period from July through November 1991, as follows:

Paragraph 7(t) Reprimands to Betty Bates, July 23, 29, September 9 & 11.

Paragraph 7(u) Suspension of Betty Bates, August 2.

Paragraph 7(v) Imposed more onerous work on Tina Pendergrass, July 10.

Paragraph 7(w) Issued reprimand to Tina Pendergrass, July 10.

Paragraph 7(x) Disciplinary warning to Geraldine Broadus, July 26.

Paragraph 7(y) Suspension of Pam McNew, August 19.

Paragraph 7(bb) Reprimand to Elaine Jones, September 9.

Paragraph 7(cc) Suspension of Tina Pendergrass, August 30.

Paragraph 7(ee) Reprimand of Al Isaac, October 30.

Paragraph 7(ff) Docked pay and issued point to Betty Bates November 1

5(a) February 14, 1992 complaint, Discharge of Pam McNew, December, 1991.

5(b) March 20, 1992 complaint. Discharge of Pam McNew, December 1991

5(a) October 14, 1992 complaint. Transfer of Isaac and Bates.

a. *Betty Bates, paragraphs 7(t), (v), and (ff)*

After her collapse and hospitalization on April 29, Bates returned to work on July 16. Things had not changed. On her first day back in the aerosol room Blizzard said to Burnside, in Bates' presence ''I wonder how she's doing without her buddy here, Curtis, now that he's gone.''

On July 19, Bates was warned for improperly installing valves. Her problem was a new rule that employees had to wear safety glasses. She wore the safety glasses, but she had to continue to wear her own glasses. As a result of the safety glasses worn over her bifocals, her own glasses steamed up and she couldn't see well enough to put the valves in the cans properly. (Apparently no one there knew about the availability of prescription safety glasses.) She told Burnside of her problem, but he told her to speed up, constantly called her a liar, and said she was trying to trick him.

On July 19 Bates was issued a warning, for a group one, rule 14 offense. Group one is defined as ''serious misconduct and will almost always result in discharge.'' Rule 14 is ''Intentional interference with production, or the work of another employee.'' This shows that Burnside thought that Bates was intentionally slowing down. I don't know what Terry Merrill was thinking when he wrote his comments on this warning. He wrote ''Ms. Bates is a packer and must perform her packer duties satisfactorily.''

Bates got a second warning on July 26. This time it was for a group two, rule 1 violation, ''poor work performance'' but arose out of the continuing problem Bates was having with seeing because of the requirement to wear nonprescription safety glasses. On July 29, she was warned again for the same thing. Finally, Bates was transferred from the valve stem job to the end of the line, boxing and stocking finished product. While she was working on this some boxes fell off the line. Burnside issued her another warning on August 1, and Merrill authorized a 3-day suspension from August 5 through 8. When Burnside handed Bates the suspension notice she claimed she was being harassed. Burnside told her that if she didn't like it, she could use her time on suspension to find another job.

After her suspension Bates returned and things went along well until September 6 when she was written up for ''running in the work area,'' a violation of group two, rule 10, failure to follow safety procedures. As far as I can tell from this record, there is no rule against running. Indeed, I noted in the film clip (R. Exh. 40) that the employee at the end of the line was nearly running the short distance from stacking boxes to the place where she was boxing cans.

Bates received another warning on September 11. This one was for violation for group two, rule 5, ''conducting personal business during work hours without authorization.'' Bates explained that another employee named James Hunter asked her a question and she didn't answer him. She was not suspended for this violation.

On November 1, Bates and Elaine Jones were assigned to scrub the floor in the gas house. While they were working with a solvent Bates noticed that the whole sole of her shoe fell off. She went and showed the shoes to Burnside. She said she needed a new pair of shoes. Burnside replied for her to do what she had to do. She left the plant, went and bought a new pair of shoes, and came back to work. Burnside said to her, ''now see if you can't keep them a little cleaner.'' He also told her to put pieces of cardboard under her feet. Bates testified that the solvent ate through the cardboard, and part of Jones' shoe was eaten by the solvent. Bates was docked 1 hour's pay for going to buy the shoes, and she received one-half an attendance point.

Burnside's testimony merely reflects his comments on the various warnings. He mentioned nothing about safety glasses.

It is obvious from all of the facts I have found here that it was the intention of this Company to rid itself of these union activists, one way or another. Bates and Tina Pendergrass were the only survivors of the in-plant committee group indentified to the Company in March and April. There is no indication that the attitudes of top management had changed with the certification of the Union in August. In fact, a reading of the warning notices, charges of intentional interference with production, of physical problems, to charges of ''running'' in a department where speed of the line and urgency of production were the only important factors for Pete Burnside, shows that Burnside was reaching anywhere he could to harass and intimidate Bates. His reason, as he urged her to find another job while she was on suspension, was obvious—to get rid of Bates, one way or another. I find all of these disciplinary notices, Bates' suspension, the docking of her pay on November 1, and the half point to be violations of Section 8(a)(1) and (3).

b. *Tina Pendergrass*

Pendergrass testified that she received a written warning on July 9 for a violations of group two, rule 3, leaving her work area without permission. She refused to give any explanation to the Company at the time she received the notice, but she testified at this hearing that she had gotten some solvent on her hand and went to the restroom to wash it off. While I have doubts about her story, I still believe, in the light of all the Company's actions in this case, that disciplinary warnings were issued to union activists and sympathizers, regardless of the fault of the individual and without consideration of any extenuating circumstances.

Similarly, I find that Pendergrass' warning and a 3-day suspension on August 30 were a part of a continuing campaign of harassment and retaliation for employees' union sympathies and activities.[112]

I therefore find that by issuing warnings to Tina Pendergrass on July 9 and August 30, and the 3-day suspension from September 9 through 11, are violations of Section 8(a)(1) and (3) of the Act.

c. *Geraldine Broadus*

Broadus was transferred back to the aerosol line in July. On July 26 she was given a disciplinary warning for poor work performance. She was charged with failure to keep up with the line while installing valve stems. Broadus was suspended back in May for alleged disloyalty, but there is no indication that she was a union activist or sympathizer. I, therefore, cannot find that this isolated warning was the result of the campaign which I have found was directed against more prominent union adherents. I do not find a violation of law in this instance.

d. *Pam McNew*

McNew returned to work after having been reinstated by agreement between OSHA and the Company on June 3. She was assigned to the solvent line for a couple of weeks, then sent back to the aerosol line. She testified, credibly, that Burnside's attitude had changed completely after the Union started its campaign. He would stand behind the employees while they were working and call them names. She said it was completely different from the way it was before the Union.

On August 19, McNew was keeping Bates supplied with boxes and trying to keep the boxes from falling off the conveyor belt. Two boxes did fall off, and Burnside looked at McNew and told her that if it happened again he would write her up. McNew said ''Okay'' and continued to work. Later that day Burnside came to her and said she was being suspended for 3 days because of the box incident. McNew stated that boxes had fallen many times before, and employees had merely been told to be more careful and they would check the boxes for damage to the contents.

I find this to be a further case of harassment of a union activist and a violation of Section 8(a)(1) and (3) of the Act.

[112] Because of my doubts about Pendergrass' testimony, I do not find the alleged refusal by the Company to allow union representation here to be a violation of law.

After this McNew continued on the aerosol line. Her arm had begun to pain her before the suspension and got worse after she came back to work.

The condition worsened until, around August 26, she was in severe pain, particularly when she was required to place boxes of product on the skids. She was putting cans on the line shortly after August 26, when there was a skid on top of the cans she needed. She asked Pete Burnside to have the skid removed because the line was moving fast and she couldn't get at the cans. He did not do it, so she moved it herself. After that her arm hurt so bad she could not continue working. Burnside sent her home, saying that if she couldn't do the work, she had to go home.

She was under a physician's treatment for what was diagnosed as tendentitis. She spoke to John MacLeod about this, and she said she had filed a claim under workers' compensation. However, the Company apparently had not received any notice of the workers' compensation claim by September 9, so MacLeod wrote McNew a letter telling her she was discharged because of excess absentee points. This was recognized as an error, and McNew was reinstated. But this was only temporary. She remained out on disability, and on December 19 MacLeod fired her again, saying that since she had not reported to work since August 26 they could no longer hold her job open.

McNew was examined by two different physicians, her own physician and a physician recommended by the Union, but she did not keep appointments made for her with company selected physicians. Her compensation case was still pending as of the day she testified, May 26, 1992.

The Respondent maintains that it is entitled under its preexisting policy to discharge anyone who has been absent for any reason for longer than 13 weeks without some idea when that person is going to return.

Beyond this, the Respondent maintains that McNew should have reported the injury before she did, that she did not work at all in the aerosol room from June 6 to July 24, worked only 8 days from July 24 to August 2, on August 16, 23, and 26, when she went home because of her alleged injury. To document this, Respondent presented through Pete Burnside a list of people allegedly working in the aerosol room from June 6 to August 26, 1991. Respondent thus claims that McNew's injury could not have been caused by overwork on the aerosol line.

Respondent also brought in an expert witness, a physician named Dr. David Randolph. Dr. Randolph was asked his opinions on whether boxing and packing cans could have caused McNew's claimed injury, and whether either or both of the diagnoses she received from doctors who examined her were correct. To both of these questions he gave negative answers. He said she could not have received the injury she described from the work that she did, and the two other doctors had made incorrect diagnoses.

With regard to the Company's argument that it had a policy governing employees on ''leave of absence,'' John MacLeod testified that the Company allows 13 weeks for a leave of absence, then, if there was a written estimate of a return time, they ''would consider that.''[113] If there was no written estimate, then the employee was discharged. A list[114] was presented allegedly showing all employees ''discharged after extended leaves of absence.'' There was no timespan given, but the first discharge on the list is given as July 15, 1988. There is no indication on this document that it included those employees absent because of work-related injuries[115] nor was there any testimony, nor any record concerning employees who had not been discharged for being on leave of absence, or work-related injury leave.

I have found in this case that figures and statistics presented by the Respondent should be examined very carefully, and I have noted, with respect to the direct testimony of Merrill and Blizzard, that artfully phrased questioning can permit testimony which skirts or avoids areas which could bring out facts contrary to the positions taken by Respondent. I draw no inference from that state of things here, but the claim that Company has a firm policy on this point is not, in my opinion, supported by substantial evidence.

I also have problems with Respondent's figures on McNew's employment in the aerosol room. I have already indicated that I do not trust Burnside's testimony. Likewise I do not trust the figures allegedly showing aerosol line staffing.

To the argument that McNew was tardy about reporting her problem, I can respond by noting that she thought it was just a strain and would go away and that she kept going until it got too severe for her to continue. I would have thought that the Company would have applauded such dedication to her job.

Finally, I have problems with Dr. Randolph's objectivity here. He was less than candid in responding to questions about his association with the Company, and I think that his opinions regarding the reports made by other physicians indicate that his differences are with those doctors, not with McNew. Reasonable men (and women) can differ, and differences of opinion among famous as well as just ordinary doctors are widespread and notorious.

Summing up, I do not think that the Respondent has overcome the prima facie case presented by the General Counsel showing McNew's union activity,[116] and Respondent's actions against her and others, including that very assignment which apparently brought about her injury and absence for the 13-week period.

I therefore find that the Respondent has not established its policy to discharge employees after the 13-week period described above, by a preponderance of the evidence and that it has violated the law in discharging McNew. *Wright Line*, 251 NLRB 1083 (1980); *Merrillat Industries*, 307 NLRB 1301 (1992); *W. F. Bolin Co.*, 311 NLRB 1118 (1993).

e. *Elaine Jones*

Jones was disciplined on September 9 for a violation of group two, rule 1, poor work performance. She testified that she was putting cans in boxes and running the boxes into machine that glued the boxes. When the boxes are pushed into the machine, there are two clamps that grasp it and pull

[113] ''That,'' presumably meaning whether to allow the leave to continue, or not.

[114] R. Exh. 43.

[115] Although we know, from this record, that Treasure Chestnut, Connie Robinson, and Bonnie Wilson were all injured.

[116] Including service on the Union's negotiating committee through late 1991 and all of 1992.

it through evenly. What was happening to Jones that day was that one clamp would catch the box and the other wouldn't. This twists the box and can tear the box and, sometimes, damage the cans inside. Burnside observed this and came up to Jones, yelling that she was deliberately putting the boxes in crooked. He stood there ''yelling and yelling.'' She told him if she wasn't doing it right, to get someone who could. He said that she was going to do it right or go home. At 3:45 that afternoon he gave her a warning report, stating that when she was ''not being observed she is twisting boxes.''[117]

Burnside testified that Jones was not pushing the boxes so that the dogs (clamps) would grab them properly. This explanation may be more logical, but that is not what Burnside wrote on Jones' disciplinary warning. I believe that by issuing Jones a warning that she was intentionally twisting the boxes was done in retaliation for her union activity. By September Jones was a shop steward and a member of the Union's negotiating committee. I find this to be a violation of Section 8(a)(1) and (3) of the Act.

f. *Al Isaac*

Isaac testified that on October 30, 1991, he was scraping out tanks. He was wearing protective gear, rubber gloves, safety glasses, and a respirator. On his break he had gone to the restroom. He was there when he heard the first buzzer indicating the end of the break, but he did not come out of the restroom until after the second buzzer, 1 minute later. Burnside accosted Isaac when he emerged from the restroom. He asked Isaac where he had been and Isaac told him he had to use the restroom. Burnside then said that he was late from his break and would be written up.

Isaac testified, credibly, that people were always allowed to use the restroom, and if they returned late from their breaks no supervisors had ever said anything to them. Burnside did not testify about this incident. Respondent in its brief refers to a prior incident on May 3, 1989, almost 2-1/2 years before, when Isaac was warned for talking to a former employee on company time, and to an instance when another employee had been reprimanded for ''returning late from a break.'' In fact, this warning, which was issued to Tom Franklin on March 31, 1989, over 2-1/2 years before, was for overstaying his lunch hour for 38 minutes. I do not feel that either of these instances are applicable to an employee, loaded down with safety equipment, walking out of a restroom just after the second warning.

Isaac had not been a union supporter, but he had been involved as an elected employee representative during the OSHA. In view of all the circumstances, and particularly the Company's hostility to OSHA and its investigation, I find that this warning was in retaliation for Isaac's participation in the OSHA investigation and a violation of Section 8(a)(1) of the Act.

g. *Al Isaac and Betty Bates*

On Monday, August 24, 1992, Al Isaac testified that he and Betty Bates were called into Burnside's office. Larry Parsons was there. Isaac and Bates were told to report to the night shift on August 27 at 4 p.m. Betty Bates asked if the Union knew about this. Burnside said that the Company knew what it was allowed to do and that the two employees just had to show up.

When they reported, they were the only two permanent employees on that shift. All the others were agency (temporary) employees.[118]

The General Counsel alleges that these transfers were motivated primarily because Bates was the only union steward left on the job.[119] No reason is advanced for the transfer of Isaac.

The Company did not address this incident either through testimony or in its brief.

I find that, in the light of what is now a weighty accumulation of discriminating actions, that the only logical explanation for this transfer is that Bates was a union steward, and on the night shift, with no other regular employees but she and Isaac, she was completely neutralized as a union officer. Isaac went along, I find, because of the Company's hostility to his role in the OSHA investigations. I find that these transfers are further violations of Section 8(a)(1) and (3) of the Act.

7. Physical examinations for aerosol room employees

The complaint alleges in paragraph 7(hh) that employees were required to submit to physical examinations and that the Company suspended Debbie Middleton for allegedly failing a drug test. Paragraphs 11(g) and (h) allege that these drug tests were implemented without bargaining with the Union.

On November 5, 1991, Al Isaac said that he and Debbie Middleton were working, scraping, outside the buildings. Pete Burnside came out and told Isaac that he had to go to the Bethesda Clinic, used by the Company for medical services, for a breathing test.

When he got to the clinic, a woman who worked there told him that he was there for a physical. They took his pulse, checked breathing, gave him a urine test and a drug test and weighed him.

Betty Bates testified that Burnside told her on November 5 that she had to take a breathing test. As in Isaac's case, she ended up with a complete physical. She had not been required to take a physical while working for the Company, except for a preemployment examination.

Elaine Jones and Debbie Middleton told basically the same story. Middleton ran into a complication, however, because a few weeks later she was called into the office with Chris Dixon, Larry Parsons, and Dave Blizzard. Blizzard told her that she had failed the drug test and would be suspended until she could pass. She said she was shocked, but she agreed to take another test that day, which she passed. She missed 2 days of work.

The Company relies on an excerpt from OSHA regulations, which was not introduced during the hearing, but was included as an appendix to Respondent's brief, without any

[117] If she was not being observed, how did he know she was twisting the boxes, rather than there being some other reason for the boxes not going correctly through the glue machine?

[118] Isaac testified that Bates was suspended on her third night on the shift, and had not returned at the time he was testifying, on December 7, 1992.

[119] In its brief, the General Counsel states, without further explanation, that Elaine Jones, the other steward, had been fired ''a couple of months before.''

opportunity to examine witnesses concerning this regulation, which seems to require that employees using respirators ''shall be physically able to perform the work and use the equipment.'' Assuming that these examinations were given to those who were required to use respirators in the course of their work, I do not, and cannot, know on the basis of this record what kinds of tests are appropriate under the regulation.[120] The Company made no effort to show the relation of these tests to the regulation.

Moreover, the testing of Isaac and the others was the first such test they were required to take. There is no question that the Company did not discuss the requirement to take the test with the Union. This requirement, therefore, is unlawful, and a violation of Section 8(a)(1) and (5) of the Act. Any adverse results of this unlawfully implemented policy are the responsibility of the Respondent. Therefore the suspension of Middleton is likewise unlawful under Section 8(a)(1) and (5), *Boland Marine Mfg. Co*., 225 NLRB 825 (1976); *Lockheed Ship Building Co*., 273 NLRB 171 (1984); *Newark Morning Ledger Co.*, 311 NLRB 1254 (1993).

G. *The Allegations of Violations of Section 8(a)(4)*

The complaint alleges in paragraphs 7(jj) and 14 that Respondent violated Section 8(a)(4) of the Act, by discharging Sue Brewer and Velvie Wood as alleged in paragraph 6(b); by transferring Brewer and Wood as alleged in paragraphs 7(e) and (f); and by transferring, then downgrading, Curtis Compton as alleged in paragraphs 7(i) and (j).

The General Counsel's theory for these violations is contained in their brief as follows:

> Integral to General Counsel's theory concerning the individual allegations is the context of Respondent's overall course of conduct in which they arose. Both Blizzard and Merrill expressed deep rooted and ongoing attitude(s) of extreme animus toward employees' union and other protected concerted activities. It is clear from the record that both harbored and exhibited a paranoid fear that unionism led to many ills including slow downs, sabotage, death threats along with OSHA inspections and NLRB charges. It is further clear that Merrill and Blizzard blamed the union activists for the complaints with Federal agencies and persisted in equating the Union with the NLRB as well as OSHA. Given the prevasive merged animus toward the employees' union/NLRB/OSHA activities, the complaint alleges that certain of Respondent's conduct also violated Section 8(a)(4) of the Act. In other words based on Merrill's and Blizzard's expressed assumptions that NLRB charges were part of the ''harassment'' by the Union, it is submitted their animus toward both were a motivating factor in their conduct toward Brewer, Compton, and McNew[121] as alleged in the complaint. [Footnotes omitted.]

Section 8(a)(4) makes it an unfair labor practice for an employer ''to discharge or otherwise to discriminate against an employee because he has filed charges or given testimony under this Act.

It may stretch the point to accuse Blizzard and Merrill of ''paranoid'' reactions, but the rest of this description of the actions of these two executives is certainly accurate and reflects my findings throughout this decision.

However, in this case, the record shows that all of the charges which were filed with the Board were filed by the Union, either signed by James C. Newport, the coordinator of this campaign, or by Attorney Peter M. Fox. Further, I find no evidence that Brewer or Wood or Compton gave any testimony before the commencement of this hearing, long after the events applicable to this section. It seems to me, as I have repeated many times in this decision, that the attitudes of Merrill and Blizzard, as implemented by them and by other, lower level supervisors, were the result of the employees' action not in filing charges or testifying before the Board or OSHA, but because they were union activists and sympathizers. That was enough, and the mere fact that they may have been named in Board charges or complaints would not have made one iota of difference in their treatment.

I will recommend that this allegation of violation of Section 8(a)(4) of the Act be dismissed.

H. *Refusal to Allow Union Representation*

Paragraphs 5(a) and (b) of the complaint which issued on May 7, 1992, alleges that Respondent refused to allow union representation for employees during disciplinary interviews.

Pamela Willinsky testified that she had worked at Talsol for over 2 years. She had been a shipping clerk, or a shipper, since August 1990.

In March 1992, Willinsky was called in to Supervisor Chris Dixon's office twice to discuss and receive employee discipline reports. The first of these disciplinary proceedings concerned charges by the Company that Willinsky had made three shipping errors in the last 2-1/2 months before March 17, 1992.

Willinsky testified that she asked for union representation, and Elaine Jones, then a steward, came in to discuss the discipline with Dixon, Jim Zimmerman, and Willinsky. Willinsky testified that Jones was told by Dixon that she was just there as an observer. The same thing occurred on the next day when Willinsky was given a warning that she had accumulated seven and a half attendance points. Jones was there and Jones was told the same thing.

Jones testified that she was called in to a meeting between Willinsky, Dixon, and Zimmerman. Dixon said to her that she was there as a witness only, and she was not allowed to say anything. Jones also testified that she was called in as steward to another meeting that same day for a disciplinary meeting involving another employee, Ruben Harris. She testified that she was told the same thing by Dixon, she was just there as a witness.

A third meeting occurred when Willinsky was being written up again. And again Jones was told she was just there as a witness.

Dixon and Zimmerman both testified about the meetings with Willinsky and Jones. Both insisted that Jones was not forbidden to speak. They said that she was told she could ask questions of the employee, but could not interrupt the super-

[120] I note also that Isaac, for one, was using a respirator on October 30, the day he was reprimanded for coming out of the restroom late. He certainly had not had a physical at that time, and the record does not reveal how long he had been wearing the respirator, or how many other employees had been wearing them and for how long.

[121] McNew is not named in these sections of the complaint.

visors when they were going over the discipline involved. I note also an exhibit, a memorandum from Merrill to supervisors, including Zimmerman and Dixon (R. Exh. 53) which, in its final paragraph states that

> If the Union steward does attend, she may freely participate in the meeting. However, the steward cannot insist on speaking for the employee; the employee may be required to answer legitimate work-related questions. The steward's presence should be documented, either on the discipline report of (sic) separately. If the steward interferes with or obstructs the investigation, report it to me. This should also be documented.

This little paragraph strikes me as an instruction which could very easily be misconstrued by either the supervisors applying it in a disciplinary meeting or the steward and the employee present at the meeting.

I have found Jones to be an intelligent and candid witness. I think she reported to us just what she heard, and I think that any misunderstanding of Merrill's memorandum was on the part of Dixon and Zimmerman. I find that Dixon's instructions to Elaine Jones in the March 17 and 18 meetings violated the rights of the employee here, Willinsky, to be represented at these disciplinary meetings; and a violation of Section 8(a)(1) of the Act. *NLRB v. Weingarten*, 420 U.S. 251 (1975); *San Antonio Portland Cement Co.*, 277 NLRB 338 (1985).

I. *The Allegations of Violations of Section 8(a)(5)*

1. The June pay raise

Paragraph 11(a) of the complaint alleges that the Respondent unilaterally failed to follow its past practice of performing job evaluations and granting wage increases to unit employees.

There is no dispute that the Respondent had a practice of reviewing employee performance in the spring of each year, and awarding raises to those considered worthy. Figures submitted by the Company show that 24 employees received raises in June 1990; 15 in June 1989, and employees received raises at times other than in June in the period from 1987 to the time of this hearing. While I have commented here that I do not trust unverified figures produced by this Company, I think these particular statistics comport with the testimony of employees that evaluations were made and raises given in June.

As previously noted, the election here was held on May 10, 1991, at which time there were 17 votes for the Union, 16 votes against, and 4 challenged ballots. One of these was found to have resigned on March 26, and the challenge to his ballot was sustained by the Regional Director. The other three challenges were of Ernest Fultz, Sue Brewer, and Velvie Wood, whose cases are discussed in this decision. The Regional Director recommended that the ballots of these three be opened and counted. The Board, in a decision dated July 23, 1991, agreed, and ordered the ballots of Fultz, Brewer, and Wood to be opened and counted. The revised tally of ballots then showed 20 votes for the Union and 16 against representation. The Union was certified as bargaining representative for Talsol's employees on August 12, 1991.

On May 31, Attorney Gary Greenberg wrote to Jim Newport announcing that his firm would be representing Talsol in negotiations. He assumed that the Union would be certified and stated that he was ''acting accordingly.'' Greenberg stated with regard to the June pay increases, that ''this year, the Company believes it should not do so at this time because of its legal obligation to maintain the status quo pending negotiations. If you wish to discuss this, please let me know.''

Newport responded on June 5, urging that the Company continue its past practice of granting increases in June.

On June 7, Greenberg wrote Newport again, proposing that the June wage reviews be postponed ''pending negotiations for a contract.'' On June 24, Greenberg wrote and discussed the Company's plan to increase the wages of three paintmakers by $2 per hour. Again he asked Newport to let him know if he wanted to discuss this matter.

On June 27, Newport answered, rejecting the Company's plan to raise the paintmakers' wages, and indicated that he was willing to negotiate wages for all employees.

Greenberg replied to this on June 28, advising that the Company was going to go ahead with the raises to the paintmakers.

There was some conversation between Newport and Greenberg on this issue, but no resolution was reached. Greenberg did not testify here.

The problem with the Company's position here is that the Union was not certified in June and, while it may have seemed likely to both Greenberg and Newport that the Union would be certified, there was no certainty. If either the Company or the Union had entered into negotiations in June over these discretionary pay raises, or over the paintmakers' wages, they would have been in danger of violating the law, just as the Company would have been in danger of violating the law if it unilaterally made changes in terms and conditions of employment before the challenges were determined, and if, in fact, the determination of challenges resulted, as it did here, in the certification of the Union. *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701 (1975); *Allis-Chalmers Corp.*, 286 NLRB 219 (1987).

As claimed by the General Counsel, the wage review program was a term and condition of employment, and a unilateral change in that condition of employment, despite the casuistry of an offer to bargain with a noncertified union, was a violation of Section 8(a)(1) and (5) of the Act. *Daily News of Los Angeles*, 304 NLRB 511 (1991), and cases cited therein. *Anaconda Ericson, Inc.*, 261 NLRB 831 (1982), is not really applicable here since the situation in that case involved a wage increase during the actual course of negotiations.

2. New safety rules

The complaint alleges in paragraph 1(b) that the Company issued a new set of safety rules on June 3, 1991. Here, there was no contact with the Union. Certainly safety rules are terms and conditions of employment, and unilateral changes of safety rules, as with the wage increases discussed in the previous section, may violate Section 8(a)(5). Here, there was an ongoing OSHA investigation, but there is no claim on the part of the Company that these new rules were promulgated pursuant to that investigation. Moreover, I cannot agree with the Company's position that these rules were only

clarifications of existing policy,[122] since they set out entirely new policies in the area of punishments for employees' not observing safety rules. This is substantive, rather than merely procedural, and was a material change which, as noted above, Respondent initiated in that time period at its peril. I find that this change in rules violated Section 8(a)(1) and (5). *Herman Sausage Co*., 122 NLRB 168 (1958); *Little Rock Downtowner*, 168 NLRB 107 (1968).[123]

3. Change in restroom policy

Paragraph 11(c) of the complaint alleges that about July 10, the Respondent implemented a new procedure under which employees could temporarily leave their job stations. The General Counsel maintains that this change in policy occurred about July 9 in a conversation between Pete Burnside and Tina Pendergrass.[124] I have found (sec. III,F,6,b) that the discipline against Pendergrass at about this time violated Section 8(a)(1) and (3) of the Act. My recollection of the facts in this case shows that the rules restricting employees in the aerosol room were instituted long before July (see secs. III,F,3 and 5) and while enforcement may not have been consistent there were restrictions similar to those complained of here, not only in the aerosol room, but elsewhere in the plant (see secs. III,B,2,b and c) as early as mid-April.

I therefore do not find that the General Counsel has estalished that restroom rules were changed in July 1991.

4. New work quotas

The complaint alleges in paragraphs 11(d), (d)(i), and (d)(ii) that about August 2 the Respondent unilaterally implemented new work quotas for employees in the shipping department. Thereafter it issued a disciplinary warning to employee Mike Vanney pursuant to those new work quotas, and later suspended Vanney.

The facts show that the shipping department had operated for some time with a production goal of 20 orders per day for the whole department.

Early in August, Supervisor Larry Parsons announced to employees a new quota of 60 cases per employee per hour.[125] No notice was given to the Union.

Under this rule an employee named Randy Stevens was warned by an employee discipline report on August 19, and employee Mike Vanney was suspended for 3 days on August 9 and for an additional 6 days on September 20.

Here, as with the pay raises, and the safety rules discussed in this section, the Company unilaterally, imposed, new working conditions, and issued discipline to employees under those unilaterally imposed conditions. I find that the Company has further violated Section 8(a)(1) and (5) by these actions *Mike O'Connor Chevrolet-Buick-GMC Co*., supra.

5. Layoffs in the aerosol department

Paragraph 11(e) alleges that, about September 4, the Respondent instituted a system of laying off employees for parts of workdays. This has been discussed above in section III,F,4. There was no notice to the Union about this change in policy and such change is a further violation of Section 8(a)(1) and (5) of the Act. *San Antonio Portland Cement*, 277 NLRB 309 (1975).

6. Change in working hours

Paragraph 11(f) of the complaint alleges that, about August 7, Pete Burnside changed the hours of work on the aerosol line day shift from 7:30 a.m. to 4 p.m. to 6:30 a.m. to 3 p.m. Burnside testified that he changed the hours at employees' request to spend less time working in the hottest parts of the days.

This may be true, but work hours are still a condition of employment and, even though the Union had not yet been certified, the Respondent violated the law by such a unilateral change. I find this to be another violation of Section 8(a)(1) and (5) of the Act. *San Antonio Portland Cement*, supra.

7. Physical examinations and drug testing

These matters have been considered above in section III,F,7 of this decision.

IV. THE REMEDY

Having found that the Respondent has committed numerous unfair labor practices I shall recommend that it cease and desist therefrom, and that it take certain affirmative actions designed to effectuate the policies of the Act.

Having found that the Respondent has violated the law by issuing employee discipline reports to a number of employees, I shall recommend that all such reports be removed from the Respondent's files, and all records of such discipline be expunged.

Having found that the Respondent has violated the law by transferring employees to other departments and other shifts, I shall recommend that it offer any employees to transferred immediate transfer back to the shifts or departments from which they were transferred.

Having found that Respondent has suspended employees Geraldine Broadus, Sue Brewer, Betty Bates, Tina Pendergrass, Pam McNew, Elaine Jones, Alan Isaac, and Mike Vanney, I shall recommend that records of those supensions shall be removed from the employees' files and that the employees be made whole for any wages lost due to those suspensions.

Since I have found that employees working on Respondent's aerosol line on various dates in September 1991 were unlawfully laid off, I shall recommend that those employees working on those days, to be determined at the compliance stage of these proceedings, shall be made whole for the wages they lost on those days.

Having found that Respondent has unlawfully discharged Teresa Greene, Ernest Fultz, Curtis Compton, Darryl Denham, Sue Brewer, Velvie Wood, and Pam McNew, I shall recommend that these employees be offered immediate and full reinstatement to their former positions or, if those positions are not available, to substantially equivalent posi-

[122] *Peerless Food Products*, 236 NLRB 161 (1978).

[123] A case with which I had some slight connection in younger and happier days.

[124] I have serious doubts about Pendergrass' credibility in this as well as other matters.

[125] Parsons testified that the new quotas were ordered by Terry Merrill because the latter thought employees were ''laying down on the job.''

tions, together with all seniority and other rights and privileges to which they would have been entitled, but for the discrimination against them, and that they may be made whole for any wages and other benefits they may have lost by reason of the discrimination against them, less any interim earnings, with the amounts due and interest thereon computed in accordance with the formulas in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

Having found that Respondent has withheld wage increases to which bargaining unit employees were entitled and would have received but for the Respondent's unilateral conduct in violation of Section 8(a)(5) of the Act, I shall recommend that each of the affected employees in the bargaining unit be made whole for the increases they would have received since May 31, 1991, by payment to them of the difference between their actual wages and the wages they would have otherwise received, with interest there on computed as described above.

Having found that the Respondent has unilaterally imposed a requirement on employees to take physical examinations, including drug tests, I shall recommend that it rescind this requirement and also rescind all punishments administered to employees for alleged failure to pass a drug test removing from those employees' files all references to such discipline.

In this case the violations I have found are of such grievous and aggravated nature as to show a calculated disregard for the statutory rights of employees and have caused employees to be deprived of their rights since April 1991. In such a case, I believe that a broad remedial order is warranted. *Hickmott Foods*, 242 NLRB 1357 (1979).

CONCLUSIONS OF LAW

1. Talsol Corporation is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. Since August 12, 1991, the Union has been the certified bargaining agent for a unit of Respondent's employees, described as follows:

> All full-time and regular part-time production and maintenance employees employed at Talsol's Union Township, Ohio, Facility, including all warehouse Employees, shipping clerks, packers, shippers/pickers, paintmakers and color matchers, but excluding all office clerical employees, managerial employees, technical employees laboratory employees, saleman, temporary employees, and all professional employees, guards and supervisors as defined in the Act.

4. By threatening employees, creating the impression that employees' union activities were under surveillance, by promulgating rules, and by harassing employees the Respondent has violated Section 8(a)(1) of the Act.

5. By issuing warnings to employees, by disciplining and suspending employees, by reducing the wages or docking pay of employees, by transferring employees from one shift to another, or one department to another, and by discharging employees, the Respondent has violated Section 8(a)(1) and (3) of the Act.

6. By requiring employees to take physical examinations and drug tests, by punishing an employee for allegedly failing a drug test, by failing to follow its past practice of annually evaluating employees and granting wage increases, by unilaterally implementing new job quotas, by unilaterally imposing new system of layoffs, and changing work hours, the Respondent has violated Section 8(a)(1) and (5) of the Act.

[Recommended Order omitted from publication.]